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No. 99-

IN THE

Supreme Court of the United States

CARNIVAL CRUISE LINES, INC.; HAL ANTILLEN, N.V.; HAL SHIPPING, LTD.; WIND SURF LIMITED; HOLLAND AMERICA LINE, N.V.; and HAL CRUISES LIMITED.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1 a. Was it error for the United States Court of Appeals for the Federal Circuit to ignore significant separation of powers and foreign policy concerns in deciding to sever the constitutional part of the federal harbor maintenance tax from the part held unconstitutional by this Court in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998).

b. Did the Federal Circuit's decision to sever part of the tax statute produce a revenue program that contradicts Congress' intention?

2. Does the Federal Circuit's formula for determining a statute's severability exacerbate the conflict and confusion among the circuits on this issue?

PARTIES

The parties in the courts below are as follows:

Plaintiffs-Appellees	Carnival Cruise Lines, Inc. HAL Antillen, N.V. HAL Shipping, Ltd. Wind Surf Limited Holland America Line, N.V. HAL Cruises Limited
Defendant-Appellant	United States

The plaintiffs-appellees in the court below are Petitioners in this Court. The defendant-appellant in the Court below is Respondent in this Court.

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of this Court:

Carnival Cruise Lines, Inc. is a public corporation and has no parent corporation. The other Petitioners are direct or indirect wholly-owned subsidiaries of Carnival Cruise Lines, Inc. Except as set forth above, no public company owns 10 percent or more of the stock of any Petitioner.

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PETITION FOR WRIT OF CERTIORARI

A writ of certiorari should be issued to review a decision of the United States Court of Appeals for the Federal Circuit that (1) usurps Congress' authority to craft tax laws, (2) is interfering with the conduct of this country's foreign relations, and (3) exacerbates the conflicts and confusion among the circuits as to the proper standard for judging the severability of federal statutes. A writ of certiorari is also warranted because Congress did not intend, and indeed affirmatively sought to avoid, the statute the Federal Circuit created when it held that the federal harbor maintenance tax on non-export cargo should continue, notwithstanding the fact that the same tax on exports had been declared unconstitutional. The Federal Circuit's decision has thus distorted the "uniform" tax imposed across the "full spectrum of U.S. foreign and domestic trade" that Congress envisioned and enacted.

The statute in question, the Harbor Maintenance Revenue Act ("HMRA"), imposes a tax on cargo that passes through U.S. ports. In *United States v. United States Shoe Corp.*, 520 U.S. 360 (1998) (*"U.S. Shoe"*), this Court held that the tax is unconstitutional insofar as it is assessed on export cargo. The principal issue left open after *U.S. Shoe* was whether, despite the statute's constitutional infirmity, the tax could still be assessed on non-export cargo. The Federal Circuit held that the HMRA is severable, and that Petitioners, six related passenger cruise lines (collectively, "Carnival"), may still be taxed.

In reaching this conclusion, the court of appeals disregarded statutory language, strongly supported by legislative history, which shows that Congress intended that the burden of maintaining U.S. ports should be borne by *all* cargo; indeed, the court acknowledged that Congress was "so fearful" of the adverse impact on our country's international trading relationships of a tax that discriminated between exports and non-exports that it never would have adopted such a tax.

Nonetheless, a panel of the Federal Circuit held that the tax still could be assessed on imports, domestic shipments and passengers, even though the tax on exports has been expunged.

As a consequence of the Federal Circuit's decision, the very problems that Congress foresaw from a discriminatory tax on non-export cargo have already materialized. Our nation's largest trading partners have objected strenuously to the favorable treatment our exports receive, and have threatened formal retribution under the auspices of the World Trade Organization. Thus, the court's judicially-crafted tax has drawn the United States into an unwanted international dispute with as yet untold foreign policy implications.

The Federal Circuit felt constrained to rule as it did by this Court's dicta in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1986), that a statutory severability clause creates a strong presumption that Congress "did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." A canvas of other Supreme Court decisions, however, casts doubt upon the Federal Circuit's conclusion that the *Alaska Airlines* presumption can override contrary indications of Congress' intent. The First Circuit, moreover, has followed the different approach to severability questions announced more recently in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), in which this Court cautioned against severance of statutes, lest the judiciary invade the province of the Congress. The tension between these two strains in severability jurisprudence -- the "presumption-in-favor" strain represented by *Alaska Airlines* and the "anti-severability" strain prompted by the separation-of-powers concerns identified in *Reno* -- has left the courts of appeals adrift on this important point.

The severability question raised by Petitioners thus involves substantial issues regarding the separation of powers

between the judiciary and the legislature -- and specifically, whether the Federal Circuit overstepped proper bounds when it recrafted an important tax statute, rather than leaving that task for Congress. This Court should therefore issue a writ of certiorari to review the Federal Circuit's conclusion that the tax provisions in the HMRA are severable.

OPINIONS BELOW

The opinion of the ~~Court of~~ Appeals for the Federal Circuit is reported at 200 F.3d 1361 and is reproduced in the Appendix to this Petition ("App.") at App. 1a-16a. The opinions of the United States Court of International Trade are reported at 8 F.Supp.2d 877 and 929 F.Supp. 1570, and appear at App. 17a-23a and App. 24a-39a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is being filed within 90 days of January 5, 2000, the date on which the Court of Appeals entered judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a statute held unconstitutional under the Export Clause of the United States Constitution, which is reproduced at App. 40a. Relevant portions of the Harbor Maintenance Revenue Act are reproduced at App. 41a-49a.

STATEMENT OF THE CASE

The Statute

In the early 1980s, Congress began deliberations on a comprehensive reformulation of the Nation's water resources program. After four years of legislative effort, Congress enacted the Water Resources Development Act of 1986 (the "WRDA"), Pub L 99-662, 100 Stat. 4082 (1986).

The sensitive issue responsible for much of the legislation's delay was the funding mechanism for the statute's port, harbor, and waterway maintenance and development projects. Congress' carefully crafted compromise solution to this problem was the Harbor Maintenance Revenue Act (the "HMRA"), which was enacted as Title XIV of the WRDA. Pub. L. 99-662, Title XIV, §§ 1401-07, 100 Stat. 4266 (1986).

The key provision of the HMRA for present purposes is § 1402(a), which codifies a new subchapter of the Internal Revenue Code, 26 U.S.C. §§ 4461-62. (App. 41a-49a). That subchapter imposes an *ad valorem* excise tax on cargo that passes through certain United States ports. This harbor maintenance tax is assessed on "any port use." § 4461(a). The term "port use" is defined as "the loading of commercial cargo on" or the "unloading of commercial cargo from" a commercial vessel at a port. § 4462(a)(1). The statute defines "commercial cargo" to include "passengers transported for compensation or hire," as on a passenger cruise liner operated by Carnival. § 4462(a)(3). The tax revenues are accumulated in a Harbor Maintenance Trust Fund, *see* 26 U.S.C. § 9505, from which appropriated funds for water infrastructure projects are drawn.

The Proceedings Below

Carnival initiated this proceeding in 1993, by filing a complaint in the U.S. Court of International Trade ("CIT") challenging the manner by which the government assesses the tax on passenger cruise liners. In 1995, while Carnival's complaint was pending, the CIT issued its decision in *U.S. Shoe*, holding that the tax as applied to export cargo violated the Export Clause of the Constitution. *United States Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Tr. 1995), *aff'd*, 114 F.3d 1564 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998). In the wake of that decision, Carnival amended its complaint to include a claim that the tax statute is inseverable and, consequently, that the statute is unenforceable as to both export and non-export cargo (including passengers). In its amended and supplemented complaints, Carnival sought a refund of its tax payments in the amount of $4.4 million.[1/]

The CIT initially rejected Carnival's inseverability argument (App. 28a-39a), and proceeded to consider Carnival's remaining claims. Then, in 1998, this Court issued its decision in *U.S. Shoe*, affirming the holdings of the lower courts that the tax on cargo destined for export was unconstitutional. 523 U.S. at 369-70. Soon thereafter, the CIT, *sua sponte*, addressed Carnival's inseverability argument for a second time. (App. 17a-23a). "The quandary," said the CIT in its second decision, "is that the statute has equated passengers with cargo, and *U.S. Shoe* has held that taxing exports, or `loading' of cargo, violates the Constitution." (App. 22a). The CIT held, "[i]n congruence with the statute equating cargo to passengers and the ruling in *U.S. Shoe* voiding the [tax] on the loading of cargo," that the statute is unenforceable as to passengers. (App. 23a). The CIT entered judgment in Carnival's favor. (*Id.*).

[1/] The CIT's jurisdiction over Carnival's complaint, as amended, rested on 28 U.S.C. §§ 1581(a) and (i). *See U.S. Shoe*, 523 U.S. at 365.

Pursuant to 28 U.S.C. § 1295(a)(5), the Government appealed the CIT's final judgment to the Federal Circuit. In defense of the CIT's judgment, Carnival presented its arguments that the statute is inseverable, and that the entire statute must be stricken in the wake of *U.S. Shoe*.

The court of appeals recognized that the severability of a statute ultimately turns on legislative intent, and specifically on whether Congress would have intended the severed statute to remain in effect. (App. 11a). The relevant inquiry for the court, therefore, "was whether the statute will function in a *manner* consistent with the intent of Congress." (App. 11a (quoting *Alaska Airlines*, 480 U.S. at 685 (emphasis in original))). Although Congress had stated unequivocally its intention that the harbor maintenance tax be assessed on a "uniform basis" and "across the full spectrum of U.S. foreign and domestic trade," the Federal Circuit reversed the CIT's judgment and held that the statute was severable, and that the tax on non-export cargo could be assessed although the tax on export cargo had been expunged.[2/]

The Federal Circuit began its analysis by noting the WRDA's severability clause, 33 U.S.C. § 2304 (*see* App. 50a), and considering the effect of such a clause once a statute has been held partially invalid. (App 10a-11a).[3/] The court

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[2/] The court of appeals' decision includes a holding to the effect that the taxation of cruise passengers does not violate the Export Clause. (App. 6a-7a). That issue arose as a consequence of points raised by the Government; Carnival has not asserted that taxes paid by or on account of cruise passengers are covered by the Export Clause, and does not do so here.

[3/] The court of appeals concluded that the severability clause of the WRDA, 33 U.S.C. § 2304, applied to the specific provisions of the HMRA that are codified in the Internal Revenue Code, Title 26. (App. 14a-15a). That conclusion flies in the face of well-recognized principles of statutory construction. Indeed, not only are the tax provisions and the severability

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acknowledged that its path from that point was not entirely clear:

> Supreme Court decisions dealing with the severability of invalid portions of a statute have used various formulations of the appropriate test for deciding the issue. The Court's most recent general discussion was in *Alaska Airlines, supra,* which summarized and restated the governing principles. *We apply those principles rather than the somewhat different formulations set forth in prior Supreme Court opinions, upon which Carnival relies.*

(App. 11a) (emphasis added). The court concluded that, under its chosen *Alaska Airlines* approach, the WRDA's severability clause creates a "presumption" that Congress intended the statute to be severable, subject to rebuttal only by "'strong evidence that Congress intended otherwise'." (App. 11a-12a (quoting *Alaska Airlines*, 480 U.S. at 687)).

The court of appeals then canvassed the legislative history of the HMRA to determine Congress' intent, should the statute be found unconstitutional as to export cargo. (App. 12a-16a). The court considered, for example, those portions of the legislative history in which Congress emphasized its intention that the tax on different types of cargo be uniform among various cargo types; the court dismissed those concerns, however, as irrelevant to the question of whether the statute was severable as to exports *per se*. (App. 13a-14a).

2/ (...continued)
clause in different Titles of the WRDA (*see United States v. Locke*, 120 S.Ct. 1135, 1146 (2000) (holding that Congress' enactment of a savings clause in Title I of a statute foreclosed application of that clause to matters addressed in other Titles)), they are in different Titles of the U.S. Code. Furthermore, as will be explained in greater detail below, in footnote 12, the Federal Circuit's conclusion on this point is unsupportable in light of the structure and language of the WRDA.

The court also considered the statements in the relevant committee reports that a tax favoring U.S. exports over other types of cargo would draw the United States into an unwanted dispute with its trading partners. (App. 15a-16a). On this point, the court recognized "some evidence" that "Congress was *so fearful* of negative GATT [General Agreement on Tariffs and Trade] implications that it would not have enacted the [Harbor Tax] on imports without the [Harbor Tax] on exports." (App. 16a (internal quotation and citation omitted, emphasis added, brackets in original)). The court held, however, that Congress' fear of the consequences from a discriminatory tax was insufficient to overcome the *Alaska Airlines* presumption of severability; no "final formal action" had yet been taken against the United States, the court reasoned, and if the "serious problems" that Congress so feared came to pass, "either the executive or the legislative branch will take appropriate action." (App. 16a).

The Current Situation

This Court noted in *U.S. Shoe* that over 4,000 harbor maintenance tax refund cases were then pending before the CIT. 523 U.S. at 365, n.2. Recent inquiries with the CIT clerk's office reveal that the number of pending cases has doubled, to approximately 8,000. The CIT at one time estimated that the total number of potential tax refund claimants "may be as high as one hundred thousand." *Baxter Healthcare Corp. v. United States*, 925 F.Supp. 794, 796 (Ct. Int'l Tr. 1996).

The CIT does not keep statistics on the number of cases that involve export versus non-export cargo. As the Federal Circuit recognized, however, the severability issue raised in this case will affect the tax on all non-exports -- *i.e.*, imported

and domestic cargo, as well as passengers. (*See* App. 10a.)[4] The point underlying the court's observation is unassailable: Congress could not possibly have intended the statute to be inseverable as between, say, imports and exports, but severable in other respects, leaving only passengers and domestic cargo to shoulder the entire tax burden. (*See* H.R. REP. NO. 99-251, pt. 3 at 9 (1985) (the tax should be "borne by the direct beneficiaries of [federal] expenditures").) Thus, if Congress did not intend to pass, and would not have passed, a statute that excluded exports, the remainder of the statute must fall as a unit.[5]

Viewed from this perspective, the financial consequences of the Federal Circuit's decision are enormous. As of 1998, potential claims against the Government as a consequence of the *U.S. Shoe* decision were expected to exceed about $1 billion in the aggregate. Given that export cargo accounted for less than a third of the Government's total tax revenue under the HMRA, the Federal Circuit's decision in this case could determine the status of claims concerning the more than $3 billion collected to date on non-export cargo. *See* U.S. ARMY CORPS OF ENGINEERS, ANNUAL REPORT TO CONGRESS

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[4] Indeed, the Federal Circuit in this case relied on a CIT decision in a "test case" regarding the severability of the statute as to imports. (App. 16a. citing *Amoco Oil Co. v. United States,* 63 F.Supp. 2d 1332 (Ct. Int'l Tr. 1999)). The CIT has also decided a "test case" involving domestic cargo. *Florida Sugar Mkt. and Term. Ass'n v. United States,* 40 F.Supp. 2d 479 (Ct. Int'l Tr. 1999).

[5] The Government appeared to accept this point, and to concede that the statute is inseverable as well, when it stated in its brief in *U.S. Shoe* that the decision of the court of appeals holding the tax unconstitutional as to exports "would effectively abolish the [Harbor Maintenance] Trust Fund" as it would "void[] the Harbor Maintenance Tax in its entirety." Brief of the United States at 18 n.8, *United States v. United States Shoe Corp.,* 523 U.S. 360 (1998) (No. 97-372). At oral argument, however, the Government disclaimed any intention to suggest that the statute is inseverable.

ON THE STATUS OF THE HARBOR MAINTENANCE TRUST FUND FOR FISCAL YEAR 1998, at 10, 13 (Dec. 1999) ("ARMY REPORT").[6]

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO REVIEW THE FEDERAL CIRCUIT'S DECISION, WHICH IS CONTRARY TO CONGRESS' UNEQUIVOCAL INTENTION TO ASSESS THE PORT USE TAX UNIFORMLY ACROSS THE FULL SPECTRUM OF U.S. FOREIGN AND DOMESTIC TRADE, AND WHICH IMPROPERLY DISMISSED THE SUBSTANTIAL SEPARATION OF POWERS AND FOREIGN POLICY IMPLICATIONS OF A SEVERED STATUTE

After *U.S. Shoe* and the Federal Circuit's decision here, the HMRA imposes an excise tax on imports, coastwise trade, and passenger cruises, but not on exports. Congress would not have enacted legislation to that effect. Not only does the severed statute not "function in [the] *manner* consistent with the intent of Congress," *(Alaska Airlines*, 480 U.S. at 685 (emphasis in original)), but, as the Federal Circuit acknowledged, Congress actually feared the consequences of the tax now in place. Indeed, following *U.S. Shoe*, the very problems that Congress foresaw from such a scheme have

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[6] Although the Trust Fund has a substantial surplus, the Department of Justice has determined that refunds of tax payments will be paid from other Treasury accounts, and not from the Trust Fund itself. (ARMY REPORT at iv.)

come to pass. Particularly in these circumstances, the Federal Circuit's dismissal of Congress' concerns raises substantial questions regarding a court's authority to reformulate a tax statute in the face of contrary congressional intent.

The evidence of Congress' intention that exports *not* be excluded from the tax is abundant, beginning with the unambiguous language in the HMRA itself. The statute does not call for a tax on exports, imports or other specified forms of cargo. Rather, Congress imposed the tax on undifferentiated "port use" -- indeed, on "any port use." 26 U.S.C. § 4461(a). That broad formulation was declared unconstitutional in *U.S. Shoe*, as it impermissibly sweeps exports within the tax. By carving out exports from the definition of "port use," however, the Federal Circuit improperly interfered with the Legislature's prerogative to determine in the first instance whether a very different tax on "any port use, excluding exports" would be in this country's best interests. The Court's admonition in *Sloan v. Lemon*, 413 U.S. 825, 834 (1973), is directly on point: "The statute nowhere sets up this suggested dichotomy between [export] and [non-export cargo], and to approve such a distinction would be to create a program quite different from the one the legislature actually adopted."

The Federal Circuit severed the HMRA, notwithstanding the plain language of the statute, because it found insufficient evidence in the legislative history to overcome the court's presumption that Congress would have adopted the new statutory scheme. The HMRA's legislative history reveals, however, that the language Congress adopted, and specifically its decision to impose the tax on "any port use" rather than on specified types of cargo, was not mere happenstance. As we demonstrate below, Congress viewed the assessment of the tax on *all* cargo, exports included, as an indispensable feature of the legislation.

As the Government pointed out in *U.S. Shoe*, Congress enacted the harbor maintenance tax "in the context of the multitude of difficulties that were brought to Congress' attention by various industry and port representatives, as well as members of the executive branch." Tr. of Oral Argument, *United States v. United States Shoe Corp.*, No. 97-372, 1998 U.S. Trans LEXIS 58 at *3 (March 4, 1998). Taking these numerous factors into account, and after years of legislative work, Congress decided that a tax imposed equitably on *all* cargo types, including exports, was the proper solution to its dilemma. The House Committee on Merchant Marine and Fisheries, the House committee that was most directly involved in crafting the tax, took particular care to adopt "a uniform national fee structure," and declared its expectation that the tax would be imposed "across the full spectrum of U.S. foreign and domestic trade." H.R. REP. NO. 99-251, pt. 4, at 24, 26 (1985). The House Ways and Means Committee, which drafted the HMRA language as finally enacted, confirmed its intention that the statute impose "a uniform excise tax paid by the principal beneficiaries of Federal port development and maintenance costs." H.R. REP. No. 99-251, pt. 3, at 9 (1985). The Senate Finance Committee echoed this concern, and approved the introduction of a port use tax on a "national, uniform basis." S. REP. No. 99-228, at 5-6 (1985).

The court of appeals erroneously viewed Congress' emphasis on "uniformity" as irrelevant. That is, the court did not read that portion of the legislative history to be directed to the tax on export versus non-export cargo; rather, the court deemed the emphasis on a uniform tax as directed to the relative tax burden on bulk versus containerized products (*e.g.*, wheat and coal versus electronics products). (App. 13a). The court acknowledged, however, that the issue of bulk cargo received attention because U.S. waterborne exports have traditionally consisted largely of bulk commodities. (App. 13a-

14a).[7] Thus, even by the court of appeals' reading, the "uniformity" Congress sought reflected its desire to impose equal burdens on export and non-export cargo types. The Federal Circuit's decision has destroyed that balance.

The legislative history of the HMRA also provides abundant evidence of Congress' concern that the statute not interfere with this country's international trade relations. Congress well understood that a tax imposed on a discriminatory basis with respect to export and non-export cargo would embroil our country in a potentially destructive dispute with our trading partners. Congress therefore designed a tax that would not advantage exports at the expense of imports. These were not trivial concerns: the Merchant Marine Committee's stated objectives in crafting the tax were "*first*, to insure that any provision in the legislation within the Committee's jurisdiction was in compliance with constitutional, legal, and *international treaty obligations* of the United States," and only "[s]econd, to insure that those provisions [are] technically feasible and administratively workable in the context of international trade, and in foreign and domestic marine transportation." (H.R. REP. NO. 99-251, pt. 4, at 18 (emphasis added)).[8] The Committee specifically pointed to

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[7] The Government noted this point in its argument in *U.S. Shoe* when it attempted to defend the HMRA's *ad valorem* tax as compared with a tax based on cargo volume or tonnage. "[A] fee based on tonnage would disadvantage export-dependent ports in contrast to import-dependent ports. . . . One of [Congress'] concerns was that our export trade would be hurt by a user fee based on [tonnage]. Much of our export was and is bulk commodities . . ."; Tr. of Oral Argument, *United States v. United States Shoe Corp.*, No. 97-372, 1998 U.S. Trans LEXIS 58 at *8 (March 4, 1998).

[8] The committee did not specify what other "legal" concerns it considered when it crafted the tax. Only a few months prior to the publication of its report, however, this Court decided *Williams v. Vermont*, 472 U.S. 14 (1985), which involved a Vermont highway use tax on

(continued...)

"the possibility of either a GATT claim or the threat of retaliation by individual trading partners, or both" should Congress fail to calibrate the tax properly. (*Id.* at 24).[9]

This problem was of concern to Executive Branch officials as well. The agreement between Congress and the Administration that finally led to the enactment of the WRDA specified that the revenue to pay for the WRDA's water projects would come from an "ad valorem tax on *imports and exports*. . . ." 131 Cong. Rec. S8631-32, (daily ed. June 3, 1985) (statement of Sen. Dole) (emphasis added). At the committee hearings on the revenue provisions, in response to a question from a Congressman regarding the possibility of a

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[8] (...continued)
automobiles. The Court concluded that an exemption from the tax based on whether the purchaser of the car was a resident of Vermont when the car was purchased violated the Equal Protection Clause. The Court held that each of the car owners at issue has "an equal obligation to pay for the maintenance and improvement of Vermont's roads" and that the statute's distinction between taxpayers "bears no relation to the statutory purpose." *Id.* at 23-24. That holding might well have made Congress more reluctant to carve entire categories of cargo, such as exports, out of the statute.

[9] The Government expressed this concern in its argument in *U.S. Shoe* as well:

> Because those agreements--it was GATT at that time, and now WTO--in which there have been reciprocal reductions of tariffs . . . --there are expectations and obligations that prevent members in those agreements from discriminating against the foreign industry in favor of the domestic industry.
>
> And even though the measure adopted here was one that generally would be favorable to exports as against imports, . . . to charge user fees to imports and not to exports in these same harbors could be a basis for objections and retaliation by our trading partners as a disguised form of raising our tariffs again[.]

U.S. Shoe Tr., 1998 U.S. TRANS LEXIS 58 at *12-*13.

tax on imports alone. Administration representatives testified that a tax that excluded export cargo had been considered but rejected because it would "present significant GATT problems, *and for that reason alone* it was decided to impose the fee on both exports and imports and on movements on the inland waterways." *Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing on H.R. 6 Before the House Ways and Means Committee*, 99th Cong. 37 (Sept. 5, 1985) (Statement of Richard A. Abbey) (emphasis added). The evidence is compelling, indeed overwhelming, that Congress considered this issue, and would not have passed a statute that excluded exports from the definition of port use.

Moreover, the consequence that Congress and the Administration most feared regarding a discriminatory tax -- an international trade dispute -- has now come to pass. Our major trading partners, including the European Union ("EU"), Japan, Norway, and Canada, have formally protested the discriminatory tax that survived *U.S. Shoe*. In early 1998, the EU initiated consultations -- the first step in the international trade dispute resolution process within the World Trade Organization ("WTO")[10/] -- challenging the port use tax on several grounds. During the first round of consultations, pre-*U.S. Shoe*, officials from the United States maintained that the tax was consistent with U.S. international obligations. After *U.S. Shoe*, the parties engaged in a second round of consultations; at that time, the United States retreated from its initial position that the tax was sound, and promised to find a solution to the foreign trade problem precipitated by a discriminatory tax. (John Zarocostas, *EU Hopes to Resolve Harbor Tax Dispute*, JOURNAL OF COMMERCE (Oct. 5, 1998); *see also* ARMY REPORT at 10.)

10/ The WTO is the successor to the GATT.

More recently, the EU has threatened to escalate the dispute further. In a letter to the United States Trade Representative, the Vice President of the European Commission, the body that represents the EU in international negotiations, roundly criticized the post-*U.S. Shoe* application of the harbor maintenance tax, and emphasized that the situation threatens trade relations between the United States and the EU:

> What is not acceptable for the EC is that at present, imports alone pay for the entire operation and maintenance of US ports, to the tune of $500 million per year. US exports pay nothing. Collections on US domestic shipments amount to around $45 million only. This discriminatory application of a fee that is not justified in the first place simply cannot continue. Therefore, should the HMT continue to be levied on imports after 1 January 2000, the Community intends to initiate WTO panel action against the HMT.

(Letter from Sir Leon Brittan, OC, Vice President of the European Commission to Ambassador Charlene Barshefsky, United States Trade Representative (Aug. 20, 1999) (App. 51a, 53a)). Sir Leon designated this issue a "priority item for discussion" in future trade negotiations. (App. 52a).

Our Government has acknowledged the EU's concerns, and has emphasized "that it is in the best interest of the U.S. to resolve the [tax] issue with its trading partners." (ARMY REPORT at 11). The Administration has publicly committed to "comply with the ruling of the U.S. Supreme Court [in *U.S. Shoe*] and to maintain consistency with WTO obligations," (*id.* at 10), and thereby "address the biggest problem associated with the existing [tax]" by "eliminat[ing] the uncertainties involved with our trading partners." (*See Statement of Dr. Joseph Westphal, Assistant Sec'y of the Army (Civil Works)*

Before the House Subcommittee on Energy and Water Development, Committee on Appropriations, on the Civil Works Program Budget, Fiscal Year 2000 (March 23, 1999)). Thus, although the Federal Circuit dismissed these international trade issues as neither "formal" nor "serious," (App. 16a), they are both. Congress and the Administration are obviously concerned.

The Federal Circuit's decision, however, has raised a Catch-22 situation for Congress and the Executive. Under *U.S. Shoe*, the tax may not be collected on exports. At the same time, in light of the Federal Circuit's decision, "[c]ollection of the [tax] on imports, domestic and foreign trade zone cargo, and passengers continues, as required under the existing statutory regime." (ARMY REPORT at iv.) The tax cannot, therefore, be assessed in a manner that complies with both constitutional and international treaty obligations, as Congress had intended. If the Federal Circuit's ruling is not reversed, the trade dispute of which Congress was "so fearful" is inevitable.

The bottom line is that the HMRA after *U.S. Shoe* is simply not a statute that Congress would have enacted. As it does not impose a "uniform" tax on "any port use," it certainly does not "function in a *manner* consistent with the intent of Congress," *Alaska Airlines*, 480 U.S. at 685 (emphasis in original), and the problems that Congress specifically sought to avoid by imposing an equitably balanced tax have come to pass. By recrafting the tax statute and dismissing these congressional concerns, or leaving them for action by another branch when they become sufficiently "serious" (App. 16a), the Federal Circuit has imposed a tax that Congress expressly sought to avoid. This Court should review the Federal Circuit's decision, to reaffirm the principle that severability turns on congressional intent, and that it is not the province of the judiciary to refashion federal revenue programs.

II

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO RESOLVE THE CONFLICTS AND CONFUSION THAT EXIST AMONG THE COURTS OF APPEALS REGARDING THE PROPER STANDARD FOR DETERMINING SEVERABILITY

As the Federal Circuit recognized, this Court has announced "various formulations of the appropriate test for deciding" whether a statute is severable. (App. 11a). The court of appeals adopted the presumption of severability described in *Alaska Airlines*, as opposed to "the somewhat different formulations" found in other decisions, only because the court deemed *Alaska Airlines* to be the "most recent general discussion" on the issue. (App. 11a).

Alaska Airlines, however, is not the most recent decision of this Court on severability. The Court addressed the severability issue just three years ago in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). In that case, the Court upheld a First Amendment challenge to portions of the Communications Decency Act. Confronted with a severability clause like the clauses in the statutes at issue in both *Alaska Airlines* and this case (*id.* at 882, citing 47 U.S.C. § 608), the Court addressed the severability issue without any mention whatsoever of a presumption of severability. On the contrary, the Court highlighted the substantial separation of powers concerns that arise when a court severs a statute, and leaves in place a law that Congress might not have passed -- as the Federal Circuit certainly did here.

The Court in *Reno* began its analysis by holding that "[a] severability clause requires textual provisions that can be severed." 521 U.S. at 882. On that ground, it held (without regard to any presumption) that a statutory provision that

impermissibly restricted "indecent" as well as "obscene" material could be severed, as the latter "enjoys a textual manifestation separate from that for 'indecent' material, which we have held unconstitutional." *Id.* at 883.[11/]

The Court then considered whether the statute could be severed as between invalid applications, and applications that had been upheld. The Court in that circumstance

> declined to `dra[w] one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn' because doing so `involves a far more serious invasion of the legislative domain.'

Id. at 884, quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n. 26 (1995). The Court also repeated the oft-quoted admonition that, "because of these separation of powers concerns," a severability clause must be treated as "`an aid merely; not an inexorable command.'" 521 U.S. at 884 n. 49, quoting *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924).

The existence of two separate approaches on severability (represented by the *Alaska Airlines* presumption of severability and the *Reno* caution against courts' invading the legislative realm) has caused confusion in recent court of appeals decisions. Like the Federal Circuit in this case, the Ninth Circuit has recently cited *Alaska Airlines* for the proposition that "if one section [of a statute] is found unconstitutional, the rest of the statute remains valid." *United*

[11/] In this case, of course, there are no textual provisions imposing the tax on exports *per se* that can be severed, as the statute imposes the tax on "any port use." 26 U.S.C. § 4461(a).

States v. Spokane Tribe of Indians, 139 F.3d 1297, 1299 (9th Cir. 1998).

The First Circuit, by contrast, took the opposite approach with respect to the severability of a local ordinance. That court cited *Reno* extensively, and found in that decision a presumption *against* severability based on separation of powers concerns:

> [C]ourts confronted with severability questions clouded by serious uncertainties regarding whether the appropriate legislative body ever considered the effect of a severability provision in the relevant context ought not to be anxious to arrogate the legislative prerogative inherent in determining the preferred or more efficient means of pursuing the particular goals chosen by the responsible legislative body.

Ackerley Communications of Mass., Inc. v. City of Cambridge, 135 F.3d 210, 216 (1st Cir. 1998) (footnote omitted).

Putting aside the Federal Circuit's incorrect statement that *Alaska Airlines* is the most recent severability discussion of this Court, there is no reason for treating *Alaska Airlines* as the preferred approach to this issue. The *Reno* approach has a distinguished pedigree. For example, in *Sloan v. Lemon*, 413 U.S. 825 (1973), the Court invalidated on Establishment Clause grounds a state statute that afforded certain benefits to private school students. The Court was asked to sever the statute as between secular and religious schools. The Court declined, despite a severability clause: "The statute in question nowhere sets up this suggested dichotomy between sectarian and non-sectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted." *Id.* at 834. Similarly, in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), the Court declined to sever a state statute with a severability

clause, on the ground that the provisions "must stand or fall as a unit. Its provisions are inextricably bound together." *Id.* at 83-84.

Alaska Airlines, by contrast -- and contrary to the impression left by the Federal Circuit's decision -- actually does little to establish a firm presumption of severability. The Court in that case stated, as the Federal Circuit recognized, that a severability clause "creates a presumption that Congress did not intend the invalidity of the statute to depend on the validity of the constitutionally offensive provision." 480 U.S. at 686. That proposition, however, was not the basis for the Court's decision. Confronted with a dispute among the parties as to whether the statute in question actually contained a severability clause, the Court decided the case based on other factors, without resort to a presumption. 480 U.S. at 687 ("We need not resolve this question, for there is no need to resort to a presumption in order to find the [invalid] provision severable in this case").[12]

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[12] The dispute regarding the severability clause centered on the fact that the statute in question was a free-standing amendment to a pre-existing law. The amendment did not contain a severability clause, but the pre-existing law did. The Court was thus uncertain whether Congress intended the clause to apply to the free-standing provision. That situation is similar to the one in this case. Neither the HMRA nor the tax provisions codified in the Internal Revenue Code contain a severability clause, and the HMRA states explicitly that the portion of the Internal Revenue Code that contains a severability clause does not apply. (*See* 26 U.S.C. § 4462(f)(3).) In other words, there is no severability clause that applies to the tax provisions Congress codified in Title 26. The WRDA's severability clause applies to any provision of "this Act" (App. 50a); the HMRA, however, treats the WRDA as a separate statute, and refers to it as such. *See* 26 U.S.C. 4462(d)(2)(B) (referring, within the HMRA, to "the Water Resources Development Act of 1986"). Moreover, insofar as the WRDA severability clause in Title 33 applies to the HMRA provisions in the WRDA's Title XIV, then the "provision" the clause applies to is § 1402(a) -- that is, the entire tax. Thus, there is nothing to sever once "the objectionable provision

(continued...)

Even decisions that have mentioned a presumption of severability, for the most part confirm the observation that the question of severability "will rarely turn on the presence or absence of a severability clause." *United States v. Jackson*, 390 U.S. 570, 585 n. 27 (1968). *Alaska Airlines* cited two decisions as support for a presumption of severability: *INS v. Chadha*, 462 U.S. 919 (1983), and *Champlin Refining Co. v. Corp. Comm'n of Oklahoma*, 286 U.S. 210 (1932). *Chadha* cited a presumption of severability, but the Court then proceeded to discuss in detail the legislative history that supported the Court's conclusion. 462 U.S. at 932-35. *Champlin* discussed the presumption, but as in *Alaska Airlines*, did not deploy it, as the Court did not address the statutory provisions alleged to be inseverable. 286 U.S. at 234-35.

When the Court has cited a presumption in passing, as in *Alaska Airlines*, it has nonetheless *declined* to sever a statute in the face of any contrary indications, either from the statutory text or its legislative history. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 460 (1992) ("Nothing remains once [the invalid] provision is stricken. Accordingly, the Act must stand or fall as a whole."), *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936) ("The presumption in favor of separability [sic] does not authorize the court to give the statute 'an effect altogether different from that sought by the measure viewed as a whole'") (citation omitted).

Finally, in *Leavitt v. Jane L.*, 518 U.S. 137, 141-42 (1996) (per curiam) the Court compared the definitive

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[12] (...continued)
[*i.e.*, § 1402(a)] [is] excised from the remainder of the statute." *Alaska Airlines*, 480 U.S. at 686. Petitioners argued before the Federal Circuit, therefore, that the WRDA's severability clause does not apply with respect to export versus non-export cargo. The court of appeals rejected that argument, although that position now finds additional support in *Locke*. *See supra* note 3.

severability clause in the Utah abortion statute to a more pedestrian ("ordinary," "standard") clause, presumably referring to the common type included in the WRDA; this language suggests the Court's agreement with the observation that routine severability clauses are, in fact, "little more than a mere formality." SAND, SUTHERLAND'S STATUTORY CONSTRUCTION § 44.08 (1994). This reluctance to give substantial weight to a "standard" clause should apply to an even greater degree in this case. As the Federal Circuit noted, Congress deleted a tax-specific severability clause from an early version of the WRDA, and enacted at the last minute a non-specific clause "along with nearly one hundred other [WRDA] provisions with general applicability." (App. 14a-15a, quotation omitted.) Nothing in the events surrounding adoption of this generic severability clause reveals that Congress intended to negate its earlier comments regarding a "uniform" tax across the "full spectrum" of commerce, or its fear of a tax that excluded exports. In these circumstances, and particularly given the highly questionable application of the WRDA's severability clause to the tax provision at issue (*see supra* n. 12), the effect of the clause -- and certainly any presumption that could be derived from it -- are greatly diminished.[13]

In sum, had the court of appeals in this case followed the approach adopted by the Court in *Reno*, as the First Circuit

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13/ The *Chadha - Alaska Airlines* approach to severability has also drawn strong criticism from the academic community. *See* Laurence H. Tribe, *The Legislative Veto Decision, A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 23 (1984) ("If the debate is conducted in these terms [as set out in *Chadha*], the anti-severability position seems the winner by a wide margin"); William N. Eskridge and John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 527 (1992) (referring to *Alaska Airlines'* "unrealistic approach to severability" in light of the Constitution's bicameralism and presentment requirements); John Copeland Nagle, *Severability*, 72 N.C.L. REV. 203, 211 (1993) ("It is little wonder that severability remains a vast and troubling terrain") (quotation omitted).

did in *Ackerley*, rather than the dicta in *Alaska Airlines* cited by the Ninth Circuit in *Spokane Tribe of Indians*, the result in this case would have been different. Absent a "presumption" of severability, the language and history of the statute, combined with the consequences of a tax that discriminated against non-export cargo -- of which Congress was "so fearful" -- would have been decisive. That evidence of Congress' intent, combined with a *Reno*-inspired institutional reluctance on the part of the court to recraft a federal tax statute according to its own lights, would have led to the conclusion that the HMRA was inseverable. This Court should therefore issue a writ of certiorari to clarify whether *Alaska Airlines* or *Reno* represents the proper approach on severability issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 3, 2000

APPENDIX

APPENDIX A

United States Court of Appeals
Federal Circuit.

No. 98-1536

CARNIVAL CRUISE LINES, INC., Hal Antillen, N.V., Hal Shipping Ltd., Wind Surf Limited, Holland America Line, N.V., and Hal Cruises Limited,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

Jan. 5, 2000

Robert P. Parker, Paul, Weiss, Rifkind, Wharton & Garrison, of Washington, DC, argued for plaintiffs-appellees. With him on the brief were Robert E. Montgomery, Jr., and Aseel M. Rabie.

Todd M. Hughes, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were David W. Ogden, Acting Assistant Attorney General, and David M. Cohen, Director.

J. Kevin Horgan, deKieffer & Horgan, of Washington, DC, for amicus curiae Thomson Consumer Electronics, Inc.

Lawrence M. Friedman, Barnes, Richardson & Colburn, of Chicago, Illinois, for amicus curiae Amoco Oil Company.

Before MICHEL, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and BRYSON, Circuit Judge.

FRIEDMAN, Senior Circuit Judge.

The United States appeals the decision of the United States Court of International Trade that the application of the Harbor Maintenance Tax ("Harbor Tax"), 26 U.S.C. § 4461, to passengers on cruise ships violates the Export Clause of the United States Constitution, art. I, § 9, cl. 5. *Carnival Cruise Lines, Inc. v. United States*, 8 F.Supp.2d 877, 879-80 (Ct. Int'l Trade 1998). We reverse and remand.

I

A. The Water Resources Development Act of 1986 ("Water Resources Act"), Pub.L. No. 99-662, 100 Stat. 4082 (1986), was a comprehensive statute designed to improve the nation's ports and harbors. The Act included the Harbor Tax as Subchapter A of Title XIV. (Title XIV of the Act was separately entitled the Harbor Maintenance Revenue Act, Pub.L. No. 99-662, tit. XIV, §§ 1401-07, 100 Stat. 4082, 4266-73 (1986)). The Harbor Tax imposes an ad valorem tax upon the operators of commercial vessels for the use of certain ports. It was intended to help fund the harbor improvement programs under the Water Resources Act. The relevant portions of the Harbor Tax provide:

(a) General rule

There is hereby imposed a tax on any port use.

* * * * *

(c) Liability and time of imposition of tax

(1) Liability

The tax imposed by subsection (a) shall be paid by–

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) in any other case, the shipper.

(2) Time of imposition

Except as provided by regulations, the tax imposed by subsection (a) shall be imposed–

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

26 U.S.C. § 4461.

The statutory definitions for section 4461 include the following:

(1) Port use

The term "port use" means–

(A) the loading of commercial cargo on, or

(B) the unloading of commercial cargo from, a commercial vessel at a port.

* * * * *

(3) Commercial cargo

(A) In general

> The term "commercial cargo" means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.

26 U.S.C. § 4462(a).

The statute thus treats "passengers transported for compensation or hire" as part of a vessel's "commercial cargo," which is subject to the Harbor Tax.

The Act also includes a severability clause, discussed in part IV, below.

B. The appellees (collectively "Carnival") own and operate fleets of commercial cruise ships. Since the Harbor Tax became effective in 1987, the Customs Service has been assessing and collecting the tax for all passengers on cruises that originate, stop, or terminate in a port to which the Harbor Tax applies. Carnival protested to the Customs Service the tax on these vessels and, when the Customs Service denied the protest, filed the present suit in the Court of International Trade. *See Carnival*, 8 F.Supp.2d at 878. In their second amended complaint Carnival contended that the application of the Harbor Tax to their cruise ships violated the Export Clause of the Constitution, and was also invalid on other grounds. *See id.* at 878-79.

In 1995, prior to the filing of the present case, the Court of International Trade held in another case that, as applied to exports, the Harbor Tax violated the Export Clause. *United States Shoe Corp. v. United States*, 907 F.Supp. 408 (1995), *aff'd*, 114 F.3d 1564 (Fed.Cir.1997). In 1998, the Supreme Court upheld that ruling. *United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998) ("U.S. Shoe"). The Court noted that in *United States v. International Business Machines Corp.*, 517 U.S. 843, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996), it held that "the Export

Clause categorically bars Congress from imposing any tax on exports." *U.S. Shoe*, 523 U.S. at 363, 118 S.Ct. 1290. The issue in *U.S. Shoe* was "whether the Harbor Maintenance Tax . . . as applied to goods loaded at United States ports for export, is an impermissible tax on exports or, instead, a legitimate user fee." *Id.* The Court held that the Harbor Tax "does not qualify as a permissible user fee," and therefore was a prohibited tax on exports. *Id.*

The Court of International Trade rendered two opinions in the present case. The first, issued while *U.S. Shoe* was progressing through the appellate process, held that "those portions of the [Harbor Tax] that apply to exports, and are thus unconstitutional in accordance with this Court's opinion in U.S. Shoe . . . are severable from the remainder of the [Harbor Tax], in particular those portions of the statute that involve Plaintiffs' operations." *Carnival Cruise Lines, Inc. v. United States*, 929 F.Supp. 1570, 1577 (Ct. Int'l Trade 1996).

In its second opinion, rendered after the Supreme Court's decision in *U.S. Shoe*, the court granted partial summary judgment that, as applied to passengers, the Harbor Tax violated the Export Clause. *Carnival Cruise Lines, Inc. v. United States*, 8 F.Supp.2d 877, 880-81 (Ct. Int'l Trade 1998). The court reasoned that "the statute has equated passengers with cargo, and U.S. Shoe has held that taxing exports, or 'loading,' of cargo violates the Constitution. Therefore, the 'loading' of passengers must also violate the Constitution." *Id.* at 880.

II

The Export Clause of the Constitution, art. I, § 9, cl. 5, states:

> No Tax or Duty shall be laid on Articles exported from any State.

The Supreme Court's Export Clause jurisprudence has repeatedly recognized that the clause bars a tax on "goods." *See, e.g., International Business Machines*, 517 U.S. at 846, 848, 849, 855, 862, 116 S.Ct. 1793. In *U.S. Shoe*, the Court stated that in *International Business Machines* it had "held that the Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit." 523 U.S. at 367, 118 S.Ct. 1290; *see also Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 27, 35 S.Ct. 496, 59 L.Ed. 821 (1915); *Dooley v. United States*, 183 U.S. 151, 154-155, 22 S.Ct. 62, 46 L.Ed. 128 (1901).

The passengers on Carnival's cruise ships are neither "articles" nor "goods." They are people. The application of the Harbor Tax to them would not involve the laying of any tax upon "Articles" exported from any state. "Articles" and "goods" relate to items of commerce, not people.

To apply the Export Clause to people would be inconsistent with the basic purpose of the Clause. "As a purely historical matter, the Export Clause was originally proposed by delegates to the Federal Convention from the Southern States, who feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South." *International Business Machines*, 517 U.S. at 859, 116 S.Ct. 1793 (citing 2 M. Farrand, The Records of the Federal Convention of 1787, at 95, 305-308, 359-363 (rev. ed.1966)). The Framers sought to "alleviate the fear of northern repression through taxation of southern exports . . . by completely denying to Congress the power to tax exports at all." *Id.* at 861, 116 S.Ct. 1793. The Clause was directed solely against taxation of "exports," i.e., "goods."

The provisions of the Harbor Tax statute defining "commercial cargo," the loading or unloading of which

constitutes "port use" to which the tax applies, as "including passengers transported for compensation or hire," do not mean that by virtue of such transportation "passengers" become "articles" subject to the Export Clause. These definitional provisions are a common legislative drafting technique for defining the coverage of a statute. It is for Congress to define and determine the coverage of the Harbor Tax; Congress decided to make it applicable to passengers transported for compensation or hire. By defining the reach of the Harbor Tax to cover such passengers, however, Congress could not and did not change the carriage of passengers into the export of goods, which is what the Export Clause covers.

Indeed, before this court Carnival does not even attempt to support the Court of International Trade's holding that the Export Clause bars the application of the Harbor Tax to passengers on the cruise ships. Instead, it seeks affirmance of the court's judgment on the alternative ground that the application of the tax to exports that was invalidated in *U.S. Shoe* as violating the Export Clause cannot be severed from its application to the cruise passengers, and therefore also falls as a result of *U.S. Shoe*. We now turn to that issue.

III

Before addressing the merits of Carnival's severability argument, we must first consider the antecedent issue whether Carnival may make that argument as an alternative basis for affirming the judgment of the Court of International Trade.

A. A preliminary point may be quickly disposed of. Carnival argues that in its second decision the Court of International Trade in fact rejected and overruled its prior decision that the application of the Export Clause to exports is severable from its application to cruise ship passengers. There is nothing in that second opinion, however, that so indicates.

To the contrary, prior to discussing the constitutional issue, the court stated that its prior decision "found that the portions of the [Harbor Tax] that applied to exports were unconstitutional and severable from the remainder of the [Harbor Tax]." *Carnival*, 8 F.Supp.2d at 879. The court then ruled that "the [Harbor Tax] fees are unconstitutional with respect to transportation services provided to cruise passengers just as cargo was found to be in U.S. Shoe." *Id.* at 879- 80. The court did not even suggest that in so holding it was backing away from its prior severability decision.

In a recent opinion, written by another judge, the Court of International Trade ruled that in the first *Carnival* decision, "the court held that the unconstitutional [Harbor Tax] on exports is severable from the remainder of the [Harbor Tax], in particular those portions of the statute that involve [Carnival's] operations as shippers providing passenger services"; and that despite its subsequent decision that the Harbor Tax "on passenger services is unconstitutional . . . the basic premise that the [Harbor Tax] on exports is severable from the remaining provisions of the [Harbor Tax] is unchanged." *Amoco Oil Co. v. United States*, No. 99-19, slip op. at 5 & n.5 (Sept 1, 1999). Once again, there was no suggestion that the court's later decision in the present case altered its earlier decision in any way.

B. "Absent a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court,' but may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.' " *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 119 S.Ct. 1430, 1434-35, 143 L.Ed.2d 635 (1999) (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087

(1924)). "An argument that would modify the judgment . . . cannot be presented unless a cross-petition has been filed." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n. 14, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985); *see also Radio Steel & Mfg. Co. v. MTD Prods., Inc.*, 731 F.2d 840, 843, 844 (Fed.Cir.1984) ("The general rule is that, without taking a cross-appeal, the prevailing party may present any argument that supports the judgment in its favor," except "where the result of acceptance of its argument would be a reversal or modification of the judgment rather than an affirmance.").

Under these settled principles, Carnival may argue non-severability as an alternative ground for affirmance of the judgment of the Court of International Trade.

The substantive portion of the judgment from which the United States appeals, provided:

> ORDERED that the Harbor Maintenance Tax is unconstitutional as it applies to cruise ship passengers.

Carnival, 8 F.Supp.2d at 881.

Acceptance of Carnival's argument would result in an affirmance of that judgment, not its modification. The application of the Harbor Tax to cruise passengers would still be unconstitutional, as the judgment provides, and that judgment therefore properly would be affirmed. The reason for the conclusion of unconstitutionality would be different from the reason that the Court of International Trade gave; the tax would be unconstitutional not because such application directly violates the Export Clause, but because the application to exports held to violate the Export clause in *U.S. Shoe* could not be severed from its application to cruise passengers. That different reasoning, however, does not preclude seeking affirmance; an appellee may do so "although his argument may

involve an attack upon the reasoning of the lower court." *El Paso*, 119 S.Ct. at 1435.

To be sure, acceptance of Carnival's argument would have consequences beyond the application of the Harbor Tax to cruise passengers. If the Harbor Tax is unseverable and is unconstitutional as applied to exports, it also would appear to be unconstitutional as applied to imports. That issue, however, is irrelevant in determining the standing question before us. The present case involves only the application of the Harbor Tax to cruise passengers, and Carnival's complaint sought relief only with respect to that application.

IV

The Water Resources Act, of which the Harbor Tax is a part, contains a broad severability clause:

> If any provision of this Act, or the application of any provision of this Act, to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.

33 U.S.C. § 2304 (1994).

On its face, this provision appears to make the remainder of the Harbor Tax severable from the tax on exports held unconstitutional in *U.S. Shoe*. The latter "invalidity" holding was "the application of" a "provision of the Act" (the Harbor Tax) to a particular "circumstance" (loading the goods for export); the "application of such provision to other persons or conditions," i.e., to cruise ship passengers, "shall not be affected thereby."

Statutory language, however, sometimes is not as simple and clear as it appears. That is the case here. Just as the absence of a severability clause does not make the invalid

portion of the statute necessarily non-severable, *see Tilton v. Richardson*, 403 U.S. 672, 684, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (plurality opinion); *United States v. Jackson*, 390 U.S. 570, 585 n. 27, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the apparently clear facial applicability of such a clause does not end the inquiry. Further analysis must be made under the principle that " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam); *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234, 52 S.Ct. 559, 76 L.Ed. 1062 (1932)).

Supreme Court decisions dealing with the severability of invalid portions of a statute have used various formulations of the appropriate test for deciding the issue. The Court's most recent general discussion was in *Alaska Airlines*, *supra*, which summarized and restated the governing principles. We apply those principles rather than the somewhat different formulations set forth in prior Supreme Court opinions, upon which Carnival relies.

In *Alaska Airlines*, the Court stated that "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." 480 U.S. at 685, 107 S.Ct. 1476. The Court pointed out that it had held in previous cases that

> the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute

> in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute.

Id. at 687, 107 S.Ct. 1476 (citations omitted).

It cannot be concluded that Congress would not have enacted the remainder of the Harbor Tax had it known that the application of the tax to exports would be invalid. Indeed, in enacting the statute Congress was aware that the Export Clause might bar that application, but it nonetheless decided to cover exports. *See* H.R.Rep. No. 99-251, pt. 4, at 24 (1985). The Harbor Tax was designed to raise money to help fund the port and harbor improvements provided by the Water Resources Act. The tax would continue to perform that function, although on a lesser scale, even if it did not cover exports. The remaining portions of the Harbor Tax can function effectively and serve their purpose even after the invalid application has been excised. *Cf. New York v. United States*, 505 U.S. 144, 187, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) ("[T]he take title provision may be severed without doing violence to the rest of the Act. The Act is still operative and it still serves Congress' objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste.").

Carnival argues that because the Harbor Tax imposes as a "General rule" a tax on "any port use," Congress "has enacted no specific 'unconstitutional tax on exports' that can be excised from the statute, leaving the remainder intact." According to Carnival, sections 4461(c)(1)(B) and 4461(c)(2)(A), which specify, with respect to exports, who is to pay the tax (the exporter) and when (at the time of loading the cargo), "do not create a separate category of 'export' cargo for tax assessment;

rather, they identify the entity responsible for paying the tax, and the time at which the tax is triggered," dealing only with "the mechanics of collection."

Carnival asks us, in essence, to read the "General rule" provision in isolation from the remainder of the statute. We decline to do so. The general rule must be read in conjunction with the other statutory provisions, which explain and describe its operation, including the critical provision identifying the entity responsible for paying the tax.

Contrary to Carnival's contention, the legislative history of the statute does not show that Congress would not have imposed the Harbor Tax without applying it to exports. Carnival asserts that the history reveals that "Congress' overriding intention was to ensure that all users of specified ports contribute to their development and maintenance in a fair and balanced manner. Exclusion of exports would disrupt this critical statutory balance." None of the legislative history Carnival cites, however, shows that Congress had an "overriding" or "critical" interest in insuring that exports properly contributed their share of the tax. Congress's "overriding intention" in enacting the tax was to provide revenue to fund port and harbor maintenance and improvement projects.

Carnival argues that the report of the House Merchant Marine and Fisheries Committee "shows that it took particular care to ensure that the burdens of the tax would be distributed fairly and equitably among the various types of port use." In choosing the basis for assessing the tax, however, the committee was concerned primarily with selecting a method that would not disproportionately burden bulk commodities, which comprised a substantial portion of United States export and domestic shipping. *See* H.R.Rep. No. 99-251, pt. 4, at 24-26. The committee decided to base the tax on the value of the

goods passing through the port (an ad valorem tax) rather than on their volume, because it would have a lower overall impact on domestic shipping and exports. The committee's decision to use an ad valorem tax sheds no light on whether Congress intended the export provisions of the tax to be severable.

Carnival also argues that the severability clause does not apply to the Harbor Tax at all. The original bill, H.R. 6, 99th Cong. (1985), contained no severability clause. Four different House committees considered the legislation. Citing concerns over applying the Harbor Tax to exports, *see* H.R. Rep. 99-251, pt. 4 at 30, one of the four committees, the Merchant Marine and Fisheries Committee, recommended a severability clause, which provided:

> If section 110 of this title [the Harbor Tax] is invalid, all valid parts that are separable from section 110 remain in effect. If section 110 of this title is invalid in one or more of its applications, section 110 remains in effect in all valid applications that are severable from the invalid applications.

Id. at 13.

This proposed clause, which applied only to the Harbor Tax, did not appear in the version of the Water Resources Act voted on by the House. While considering the bill on the floor, and without explanation, however, the House substituted for H.R. 6 a revised version of the bill, H.R. 3670, 99th Cong. (1985), which contained a much broader severability clause as a prefatory section of the bill. *See* 131 Cong. Rec. 30734 (1985). Both the House and Senate versions of the bill contained this broad severability provision. *See id.*; 132 Cong. Rec. 6250 (1986). The Conference Committee, again without explanation, included the clause in Title IX, the "General provisions" of the Act, along with nearly one hundred other

"provisions with general applicability" from both the House and Senate versions of the bill. *See* Conference Report, H.R. Rep. 99-1013, at 219-20 (1986), 1986 U.S. Code Cong. & Admin. News at 6723, 6735-36.

Nothing in the legislative history even suggests, much less shows, that Congress intended to eliminate severability for the Harbor Tax when it adopted the broad severability provision rather than the narrower one that the Merchant Marine and Fisheries Committee originally proposed. Indeed, there is no indication that the sponsors of the broad severability clause were even aware of the narrower one the Merchant Marine and Fisheries Committee had drafted. All that appears from the legislative history is that Congress simply decided to include a broad severability clause that covers the entire Water Resources Act.

Carnival contends that because the severability clause applies if any provision "of this Act," or its application, is held invalid, it does not cover the Harbor Tax. It states that "[a]lthough the [Water Resources Act] was the legislative vehicle by which the [Harbor Tax] was enacted," the latter "is a free-standing title of the statute, and the port use tax statute has been incorporated as a free-standing subchapter of the Internal Revenue Code." The Water Resources Act contains fourteen titles, the last of which is captioned "Revenue Provisions" and includes as "Subchapter A" the "Harbor Maintenance Tax." That tax is a "provision of this [Water Resources] Act," and the Water Resources Act's severability clause covers it.

Carnival also contends, as does the amicus Thompson Consumer Electronics, Inc., that excising exports from the Harbor Tax could lead to conflicts with the United States trading partners and would violate American obligations under the General Agreement on Tariffs and Trade (GATT), and that

Congress did not intend to make the application of the Harbor Tax to exports severable from the balance of the tax because of such concerns. In rejecting this argument in *Amoco Oil*, *supra*, the Court of International Trade noted that although there was "some evidence [in the legislative history] to support" the argument that "Congress was so fearful of negative GATT implications that it would not have enacted the [Harbor Tax] on imports without the [Harbor Tax] on exports," it was "insufficient to rebut the strong presumption of severability." *Amoco Oil*, *supra*, slip op. at 9,12. Neither our trading partners nor the World Trade Organization has taken final formal action directed against the Harbor Tax. It is speculative and conjectural whether they will do so. If they take such action and the result is to create serious problems, either the executive or the legislative branch presumably will take appropriate action.

In sum, Carnival has not presented the "strong evidence" necessary to overcome the "presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686, 107 S.Ct. 1476.

CONCLUSION

The judgment of the Court of International Trade that the Harbor Tax "is unconstitutional as it applies to cruise ship passengers" and ordering the refund of the tax fees collected on Carnival cruise ships, is reversed. The case is remanded to that court for further proceedings consistent with this opinion, including consideration of Carnival's other objections to the imposition of the tax on cruise ship passengers that that court has not yet decided.

REVERSED AND REMANDED.

APPENDIX B

United States Court of
International Trade

Slip Op. 98-71
Court No. 93-10-00691

CARNIVAL CRUISE LINES, INC., Hal Antillen, N.V., Hal Shipping Ltd., and Wind Surf Limited,

Plaintiffs,

v.

UNITED STATES,

Defendant.

June 2, 1998

Paul, Weiss, Rifkind, Wharton & Garrison (Robert E. Montgomery, Jr. and Robert P. Parker), Washington, DC, for Plaintiffs.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (A. David Lafer and John K. Lapiana), Washington, DC, for Defendant.

OPINION

MUSGRAVE, Senior Judge.

In *U.S. Shoe Corp. v. United States*, 907 F.Supp. 408, 19 CIT 1284 (1995) ("*U.S.Shoe* "), this Court held that the Harbor Maintenance Tax ("HMT") was unconstitutional as it applied to exports. The decision was affirmed by the Court of Appeals for the Federal Circuit ("CAFC"), *U.S. Shoe Corp. v. United States*, 15 Fed. Cir. (T) ____ , 114 F.3d 1564 (1997), and, finally, by the United States Supreme Court, *United States v. U.S. Shoe Corp.*, ___ U.S. ___, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998). Not explored, however, was the question of whether the constitutionally flawed statute applied to charges imposed upon shippers for the transportation of passengers.

Plaintiffs brought this action to contest the assessment and collection of harbor maintenance taxes on passenger cruises by defendant, the United States Customs Service ("Customs"). Plaintiffs, Carnival Cruise Lines, Inc. et al. ("Carnival"), contend that cruise passengers should not trigger the imposition of the HMT. The Court finds that transportation services provided to passengers on cruises are not subject to the HMT based on the holding in *U.S. Shoe*.

Background

Carnival owns and operates fleets of commercial cruise ships. The typical Carnival cruise originates at a specific port where passengers embark and the ship then proceeds to a number of short stops, or layovers, at different ports. The cruise terminates in the final destination port where the passengers disembark. Since the imposition of the HMT in 1987, Customs has been assessing and collecting the fees for all passengers aboard cruises that originate, stop and terminate in HMT-covered ports. Plaintiffs filed a protest of the assessment and collection of the HMT which Customs denied on July 2,

1993. On October 18, 1993, plaintiffs filed a summons and complaint with the Court appealing the protest denial pursuant to 28 U.S.C. § 1581(a) (1988).

Plaintiffs subsequently amended their complaint to incorporate a constitutional challenge to the HMT. The Court certified the constitutional question for immediate appeal to the CAFC. Carnival, unopposed by Customs, petitioned the CAFC for permission to appeal the order. The CAFC denied the petition to appeal in *Carnival Cruise Lines, Inc. et al. v. United States*, 14 Fed. Cir. (T) —, 92 F.3d 1203 (1996). Subsequently, in *Carnival Cruise Lines, Inc. et al. v. United States*, 20 CIT —, 929 F.Supp. 1570 (1996), this Court found that the portions of the HMT that applied to exports were unconstitutional and severable from the remainder of the HMT. Plaintiffs maintain that the HMT, if imposed at all, should only be assessed on cruises that originate or terminate in HMT-covered ports, not on those cruises that originate and terminate in HMT-exempt ports that have layovers at HMT- covered ports.

Plaintiffs also contend that Customs assessed the HMT based on an overvalued transportation charge. The HMT is assessed as .125 percent of the value of the actual charge for transportation paid by the passenger. Customs has interpreted the value of the cruise to include all "embarkation-to-disembarkation" costs as reflected on passenger tickets. Plaintiffs argue that the value of the cruise should only include "water-borne transportation services." Pls.' Mot. for Partial Summ. J. ("Pls.' Mot.") at 27. On March 31, 1998, the Supreme Court, affirming the holding in this Court and the CAFC, struck down the HMT as it applied to exports of cargo in *United States v. U.S. Shoe Corp.*, — U.S. —, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998). In light of this decision, the Court finds that passenger cruises do not trigger HMT liability.

Standard of Review

Under 28 U.S.C. § 2639(a)(1), Customs' decision is "presumed to be correct" and the "burden of proving otherwise shall rest upon the party challenging such decision."[1] However, the CAFC has found that the presumption of correctness applies solely to factual questions and that this Court's duty is to find the correct result. The duty of the Court to find the correct result stems from both legislative and judicial sources. The CAFC found that "the trial court . . . must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative. . . . [T]he court's duty is to find the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). Pursuant to the statute, "[i]f the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision." 28 U.S.C. § 2643(b).[2] The issue before the Court is the interpretation and constitutional integrity of the HMT statute which is a question of law and is reviewed *de novo*.

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[1] 28 U.S.C. § 2639(a)(1) (1994).

[2] See *Goodman Mfg., Inc. v. United States*, 13 Fed. Cir. (T) —, —, 69 F.3d 505, 508 (1995) (the statutory presumption of correctness attaches only to an agency's factual determinations) and *Rollerblade, Inc. v. United States*, 15 Fed. Cir. (T) —, 112 F.3d 481 (1997) (legal issues are not afforded deference under 28 U.S.C. § 2639 or under the administrative deference standard promulgated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

Both parties have moved for summary judgment. Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CIT R. 56. The Court finds that there is no genuine issue as to any material fact and therefore the Court has the power to render summary judgment.

Discussion

Lengthy arguments and explanations have been advanced by the parties with respect to the application of HMT fees and the corresponding value of transportation services entailed. The Court finds that the HMT fees are unconstitutional with respect to transportation services provided to cruise passengers just as cargo was found to be in *U.S. Shoe*. Consequently, the Court does not reach the issues of HMT applicability on exempt and non- exempt ports nor the computation of the value of transportation services.

In 1987, the HMT took effect with the purpose of helping to finance the general maintenance of U.S. ports and specifically the dredging of U.S. ports. S.Rep. No. 99-126, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6646- 47. The HMT was codified at 26 U.S.C. § 4461 and states:

(a) General Rule

There is hereby imposed a *tax* on any port use.

26 U.S.C. § 4461(a) (1988) (emphasis supplied).

The statute defines port use as "(A) the loading of commercial cargo on, or (B) the unloading of commercial cargo from, a commercial vessel at port." 26 U.S.C. § 4462(a)(1) (1988). The term "commercial cargo" is defined as "any cargo transported on a commercial vessel, *including passengers* transported for compensation or hire." 26 U.S.C. § 4462(a)(3)(A) (1988) (emphasis added). In addition, Customs'

regulations base the tax assessed on passengers "upon the value of the actual charge for transportation paid by the passenger or on the prevailing charge for comparable service if no actual charge is paid." 19 C.F.R. § 24.24(4)(i) ("transportation services").

Resolution of this issue turns on the holding in *U.S. Shoe*, where the Supreme Court confirmed that levying a tax on the value of commercial cargo loaded for export violated the Export Clause of the Constitution, U.S. Const., Art I, § 9, cl. 5. The quandary is that the statute has equated passengers with cargo, and *U.S. Shoe* has held that taxing exports, or "loading," of cargo violates the Constitution. Therefore, the "loading" of passengers must also violate the Constitution, yet passengers cannot be said to be "exported." The Court finds the solution in the common meaning of the term embark which is, together with Customs' regulations and findings, synonymous with the term loading. Webster's defines "embark" to mean "to go on board a vessel or a boat for a voyage; as, the troops *embarked* for Lisbon." Webster's New International Dictionary 2nd Edition, at 835 (1956) (emphasis in original).

Under 19 C.F.R. § 4.80a, Customs defines embark to mean

> a passenger boarding a vessel for the duration of a specific voyage and *disembark* means a passenger leaving a vessel at the conclusion of a specific voyage. The terms *embark* and *disembark* are not applicable to a passenger going ashore temporarily at a coastwise port who reboards the vessel and departs with it on sailing from the port.

19 C.F.R. § 4.80a(a)(4) (1989) (emphasis in original). Although Customs' definition appears in an unrelated section of its regulations, the Court finds that this definition comports with the common meaning of the terms embark and disembark as well as load and unload with respect to passengers. The

Court finds that embark, board and load all refer to the initial activity of passenger movement from port onto the vessel. In congruence with the statute equating cargo to passengers and the ruling in *U.S. Shoe* voiding the HMT on the loading of cargo, the Court finds that the HMT with respect to passengers runs afoul of the Export Clause of the Constitution.

Conclusion

For the foregoing reasons, the Court finds that transportation services provided to passengers that embark on a cruise are not subject to the HMT.

JUDGMENT

Upon Consideration of Plaintiff's motion for partial Summary Judgment, defendant's opposition and cross-motion for summary judgment, oral argument and all other papers and proceedings, it is hereby

ORDERED that the plaintiff's motion is granted and defendant's cross- motion is denied; and it is further

ORDERED that the Harbor Maintenance Tax is unconstitutional as it applies to cruise ship passengers; and it is further

ORDERED that defendant shall refund all harbor maintenance tax fees covered under this opinion, with interest.

APPENDIX C

United States Court of
International Trade

Slip Op. 96-89
Court No. 93-10-00691

CARNIVAL CRUISE LINES, INC., Hal Antillen, N.V., Hal Shipping Ltd., and Wind Surf Limited,

Plaintiffs,

v.

UNITED STATES,

Defendant.

June 6, 1996

Paul, Weiss, Rifkind, Wharton & Garrison (Robert E. Montgomery, Jr., Robert P. Parker, Swati Agrawal), Washington, DC, for plaintiffs.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (John K. Lapiana), Washington, DC, for defendant.

MEMORANDUM OPINION AND ORDER

MUSGRAVE, Judge.

In this consolidated case, this Court recently granted Plaintiffs' motion for leave to amend its complaint to include a new claim which arose as a result of the Court's recent decision in *United States Shoe Corp. v. United States*, 19 CIT___, 907 F.Supp. 408 (1995), *appeal docketed*, No. 96-1210 (Fed.Cir. Feb. 14, 1996). In that case a three judge panel of the Court held that the Harbor Maintenance Tax (26 U.S.C. §§ 4461-4462, hereinafter "HMT") is unconstitutional as it applies to exports, as it violates the Export Clause of the United States Constitution, Article I, Section 9, Clause 5. Plaintiffs' original complaint related to specific sections of the HMT not dealing with exports; Plaintiffs' (second) amended complaint now claims that the provisions of the HMT which relate to exports are not severable from the remaining portions of the HMT, thus the entire HMT is unenforceable. Pl.s' Second Amended Complaint, Count IV, para. 43. Plaintiffs therefore claim the HMT as it relates to their operations is unenforceable. Pl.s' Second Amended Complaint, Count IV, para. 44.

The issue raised by Plaintiffs' amended complaint is whether those portions of the HMT held unconstitutional by this Court, namely the HMT "as it applies to exports," may be severed from those portions of the HMT that deal with Plaintiffs' passenger operations. The Court finds this issue to be solely one of law that may now be addressed.

The principles governing the issue of severability of unconstitutional portions of a statute from the remainder of that statute were summarized by the Supreme Court in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). In that case, the Court considered whether

an unconstitutional legislative veto provision of the Employee Protection Program (enacted as section 43 of the Airline Deregulation Act of 1978) rendered the entire Employee Protection Program unconstitutional. The Court set forth the following:

> "[A] court should refrain from invalidating more of the statute than is necessary. . . . '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.' " *Regan v. Time, Inc.*, 468 U.S. 641, 652 [104 S.Ct. 3262, 3269, 82 L.Ed.2d 487] (1984) (plurality opinion), quoting *El Paso & Northeastern R. Co. v. Guitierrez* [*Gutierrez*], 215 U.S. 87, 96 [30 S.Ct. 21, 24-25, 54 L.Ed. 106] (1909). The standard for determining the severability of an unconstitutional provision is well established: " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Buckley v. Valeo*, 424 U.S. 1, 108 [96 S.Ct. 612, 677, 46 L.Ed.2d 659] (1976) (*per curiam*), quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 [52 S.Ct. 559, 564-65, 76 L.Ed. 1062] (1932). Accord: *Regan v. Time, Inc.*, 468 U.S., at 653 [104 S.Ct. at 3269-70]; *INS v. Chadha*, 462 U.S., at 931-932 [103 S.Ct. at 2773-74]; *United States v. Jackson*, 390 U.S. 570, 585 [88 S.Ct. 1209, 1218, 20 L.Ed.2d 138] (1968).
>
> Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable

of functioning independently. *See, e.g., Hill v. Wallace*, 259 U.S. 44, 70-72 [42 S.Ct. 453, 458-59, 66 L.Ed. 822] (1922) (Future Trading Act held nonseverable because valid and invalid provisions so intertwined that the Court would have to rewrite the law to allow it to stand). . . .

The more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress. . . . The final test, for legislative vetoes as well as for other provisions, is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

The inquiry is eased when Congress has explicitly provided for severance by including a severability clause in the statute. This Court has held that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. See *INS v. Chadha*, 462 U.S., at 932 [103 S.Ct. at 2774]; *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S., at 235 [52 S.Ct. at 565]. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute. In the absence of a severability clause, however, Congress' silence is just that--silence--and does not raise a presumption against severability. See *Tilton v. Richardson*, 403 U.S. 672, 684 [91 S.Ct. 2091, 2098-99, 29 L.Ed.2d 790] (1971) (plurality opinion);

United States v. Jackson, 390 U.S., at 585, n. 27 [88 S.Ct. at 1218, n. 27].

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684-86, 107 S.Ct. 1476, 1479-81, 94 L.Ed.2d 661 (1987) (footnotes omitted). The Supreme Court examined the language and structure of the statute, as well as the legislative history in determining that Congress intended for severability of the legislative veto provision. *Id.*, 480 U.S. at 697, 107 S.Ct. at 1486.

The Court first turns to the question of whether the HMT, absent those provisions which violate the Export Clause of the Constitution, is capable of functioning independently.

The HMT was enacted as a means of funding development and maintenance of the nation's ports and waterways. The monies collected under the HMT are deposited into a designated trust fund from which monies are appropriated for specific projects. In addition to the HMT, Congress redesignated a previously enacted inland waterways tax and trust fund as part of the revenue provisions of the Water Resources Development Act of 1986, Pub.L. No. 99-662, 100 Stat. 4082 ("WRDA"). The HMT and the inland waterways tax, together with their corresponding trust funds, comprise Title XIV of the WRDA. Title XIV may also be referred to as the Harbor Maintenance Revenue Act of 1986 ("HMRA").

The HMT operates in a straightforward manner. It begins by imposing a tax on "any port use." § 4461(a). Port use is defined as "(A) the loading of commercial cargo on, or (B) the unloading of commercial cargo from a commercial vessel at a port." § 4462(a)(1). Commercial cargo is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire." § 4462(a)(3). Regulations made pursuant to statutory powers granted the

Secretary of the Treasury, § 4462(i), further define commercial cargo as ". . . merchandise transported on a commercial vessel and passengers transported for compensation or hire. Whenever the term 'cargo' is used, it means merchandise, but not passengers." 19 C.F.R. § 24.24(b)(2). The amount of tax is set according to the value of commercial cargo. § 4461(b). Section 4461(c) sets the liability and time of imposition of tax. Under section 4461(c)(1), liability is imposed on three categories of taxpayers, as follows:

> (A) in the case of cargo entering the United States, the importer,
>
> (B) in the case of cargo to be exported from the United States, the exporter, or
>
> (C) in any other case, the shipper.

Under section 4461(c)(2), the time of liability is, except as provided by regulations, as follows:

> (A) in the case of cargo to be exported from the United States, at the time of loading, and
>
> (B) in any other case, at the time of unloading.

19 C.F.R. § 24.24(e)(4)(i) sets the time and place of liability of passengers to be ". . . when a passenger boards or disembarks a commercial vessel at a port within the definition of this section, the operator of that vessel is liable for the payment of the port use fee. . . . The vessel operator on each cruise is liable only once for the port use fee for each passenger."

The only portions of the HMT which explicitly address exports, and thus are unconstitutional, are section 4461(c)(1)(B), which is a separate and distinct category of liability that operates independently of the categories of liability

dealing with "imports" and "other cases" (§§ 4461(c)(1)(A) and (C)); and section 4461(c)(2)(A), a provision which sets the time of liability. In removing these "export" provisions, the statute still imposes liability on the remaining categories of liability other than exports. The HMT can still be imposed on any port use except for loading of commercial cargo [for export]. (§ 4461(a)(B)). Ports can still be "used," as commercial cargo can still be "unloaded." (§ 4461(a)(B)). The time of liability can still be "at the time of unloading." (§4461(c)(2)(B)). The party liable for payment of the tax in the case of cargo entering the United States can still be the importer, (§ 4461(c)(1)(A)); and in any other case [but for exports and imports], the party liable can still be the shipper. (§ 4461(c)(1)(C)). Thus, neither of the "export" provisions are essential to the functioning of the statute in relation to the remaining categories of liability for port use. The HMT is therefore capable of functioning independently of the invalid "export" provisions.

The Court now turns to the question of whether the remaining statute, absent the "export" provisions held invalid, is legislation Congress would not have enacted.

Plaintiffs question whether the severability clause applies to specific provisions of the HMRA by pointing out that the severability clause was included under a separate title of the WRDA (Title IX), and not part of what Plaintiffs call the "free-standing" HMRA. Pl.s' Br. at 11. Plaintiffs also point out that Title IX is "a repository for the various miscellaneous provisions in the statute." *Id.* at 12. Furthermore, they argue that the legislative history of the WRDA in general, and the severability clause in particular, indicate that Congress was only concerned that the possible unconstitutionality of the tax on exports not jeopardize the entire WRDA. *Id.* at 12-15.

Plaintiffs also argue that the sparse legislative history of this provision provides no indication that Congress intended it to apply to specific provisions of the HMRA, and that it is a mere formality. *Id.* at 12. Thus, Plaintiffs argue, the severability clause provides "absolutely no support for the preservation of the non-export provisions of the port use tax following *U.S. Shoe*." *Id.*

The Court disagrees. Plaintiffs in essence are contending that by the structure of the WRDA, Congress did not intend the severability clause to apply to a specific provision (tax on exports), but to a larger, more general provision (the HMT), but not to a larger, even more general provision (the HMRA (Title XIV of the WRDA)), if it applies at all; and that by the history of the WRDA, Congress was concerned that the tax on exports would jeopardize the entire WRDA, so it included a severability clause in the WRDA to ensure that the tax on exports could be severed from the remaining provisions of the statute, thereby taking those remaining provisions of the WRDA out of jeopardy; but that the severability clause is to be applied so that the remaining valid provisions of the HMT would be severed from the WRDA as well. The Court finds the logic of these arguments untenable.

The Court begins with the language of the severability clause, as that is the foremost expression of Congressional intent. *Connecticut Nat. Bank. v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149-50, 117 L.Ed.2d 391 (1992). The WRDA contains a severability clause which states as follows:

> If any provision of this Act or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.

WRDA § 949, 33 U.S.C. § 2304 (1988). The inclusion of such a provision creates the presumption that Congress did not intend the validity of the WRDA to depend upon the validity of the constitutionally offensive provision--in this case, those portions of the HMT dealing with exports. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-86, 107 S.Ct. 1476, 1479-81, 94 L.Ed.2d 661 (1987) (citing *INS v. Chadha*, 462 U.S. 919, 932, 103 S.Ct. 2764, 2774, 77 L.Ed.2d 317 (1983)). The severability clause clearly indicates that Congress intended, in the event a provision of the statute is not valid as it applies to a person or circumstance, that such provision would still be valid as to other persons or circumstances. Thus, the language of the severability clause readily accommodates problems of unconstitutionality with all or a portion of the HMT. The HMT specifically sets forth the persons liable for payment of the port use tax, and the circumstances under which payment is to be made. Thus, it appears Congress intended the severability clause to apply to the HMT, and that the inapplicability of the port use tax to exports shall not affect applicability of the HMT to other persons or circumstances provided for in the HMT, or the WRDA in general.

The structure of the WRDA also favors severability of the tax on exports only. The severability clause is included under Title IX of the WRDA, entitled "General Provisions." The HMT is included under Title XIV of the WRDA, entitled "Revenue Provisions," but may be cited as the Harbor Maintenance Revenue Act of 1986. Harbor Maintenance Revenue Act of 1986, P.L. 99-662, Title XIV, § 1401, 100 Stat. 4266 (1986). Thus, Plaintiffs' characterizations of the HMRA aside, both provisions are part of, and not separate from the WRDA. Moreover, the placement of the severability clause within the general provisions of the WRDA indicates that Congress intended these provisions, including the severability clause, to apply to all of the WRDA, not just the provisions

within Title IX. These general provisions, while they might be miscellaneous in nature, have applicability to various provisions throughout the statute, as indicated by titles such as "Annual Obligation Ceilings (§ 901)," "Maximum Cost of Projects (§ 902)," or "Review of Cost Effectiveness of Design (§ 911)." Thus, the structure of the WRDA does not indicate that Congress intended for the severability clause not to apply to specific revenue provisions of the WRDA. It does not indicate that Congress intended the validity of the WRDA to depend upon the validity of the export tax. Nor does the structure indicate that the validity of the HMT or the HMRA depends upon the validity of the export tax.

Plaintiffs argument that the sparse legislative history of the severability clause provides no indication that Congress intended it to apply to specific provisions of the HMRA attempts to shift the presumption against severability. Given a severability clause, the burden is not to demonstrate that Congress did intend to provide for severability, but to demonstrate that Congress did not intend to provide for severability. For severability not to apply, the history, language and structure of the WRDA against severability must be strong. Absent strong evidence against severability, the presumption is that Congress intended any offensive provision to be severed from those which are valid. *Alaska Airlines, Inc. v. Brock*, 480 U.S. at 686, 107 S.Ct. at 1481.

The legislative history reveals that four committees of the House of Representatives (Public Works and Transportation, Interior and Insular Affairs, Ways and Means, and Merchant Marine and Fisheries) considered the House version of the bill, H.R. 6, 99th Cong., 1st Sess. (1985); two committees of the Senate (Environment and Public Works, and Finance) considered the Senate version of the bill S. 1567, 99th Cong., 1st Sess. (1985); and a conference committee of the House and

Senate reconciled the different version of the bill before passage.

In the House, Public Works and Transportation was first to report the bill, with amendments, on August 1, 1985.[1] Interior and Insular Affairs favorably reported the bill, with amendments, on September 16, 1985, and recommended passage.[2] Ways and Means favorably reported the bill, with amendments, on September 23, 1985, and recommended passage.[3] Merchant Marine and Fisheries ("Merchant Marine") also favorably reported the bill with amendments on September 23, and also recommended passage.[4]

In the Senate, Environment and Public Works favorably reported an original bill (S. 1567) on August 1, 1985, and recommended passage.[5] Finance favorably reported the bill, with an amendment, and recommended passage on January 8, 1986.[6]

The Committee of Conference recommended a reconciled version of the bills to the House and Senate on October 17, 1986.[7]

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[1] H.R.Rep. No. 251, 99th Cong., 1st Sess., pt. 1 (1985).

[2] H.R.Rep. No. 251, 99th Cong., 1st Sess., pt. 2 (1985).

[3] H.R.Rep. No. 251, 99th Cong., 1st Sess., pt. 3 (1985).

[4] H.R.Rep. No. 251, 99th Cong., 1st Sess., pt. 4 (1985).

[5] S.Rep. No. 126, 99th Cong., 1st Sess. (19[illegible]), *reprinted in* 1986 U.S.C.C.A.N. 6639.

[6] S.Rep. No. 228, 99th Cong., 1st Sess. (1985), *reprinted in* 1986 U.S.C.C.A.N. 6705.

[7] Water Resources Development Act of 1986, H.R.Conf.Rep. No. 1013, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 6723.

Of the House and Senate reports, only one committee included a severability clause in its version of the bill. Merchant Marine raised a concern about the constitutionality of the tax on exports. To prevent that tax from jeopardizing the remaining provisions of the HMT (§ 110 of the Merchant Marine report), Merchant Marine added a severability clause (§ 116) which set forth:

> If section 110 of this title is invalid, all valid parts that are severable from section 110 remain in effect. *If section 110 of this title is invalid in one or more of its applications, section 110 remains in effect in all valid applications that are severable from the invalid applications.*

H.R.Rep. No. 251, 99th Cong., 1st Sess., pt. 4, at 13 (1985) (emphasis added). The Committee provided the following explanation for section 116:

> Lastly, Mr. Bateman's amendment [section 116] would provide for severability should any of the provisions of section 110 be found unconstitutional or invalid for other reasons. The concern of the Committee and the subject of the amendment was, for example, that the constitutional arguments that had been made against imposing a tax *on exports* might result in the legislation being declared invalid and it was the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid.

Id. at 30 (emphasis added). The Committee of Conference reported the bill as it essentially was enacted, with the severability clause set forth as section 949 of Title IX. H.R.Conf.Rep. No. 1013, 99th Cong., 2d Sess., at 123 (1986).

The Conference Committee did not explain why it included the provision, or why the provision was placed under Title IX.

Plaintiffs argue that Merchant Marine was concerned about severability, "but *only* to the extent that the questionable constitutionality of the tax might affect the rest of the legislation." Pl.s' Br. at 14 (emphasis in original). Plaintiffs contend that "the severability clause was directed solely at the port use tax to make clear that the comprehensive reforms of the U.S. water policy on which Congress had worked for a number of years would not be drawn into question by an Export Clause challenge." *Id.* Plaintiffs further argue that this view is supported by Ways and Means' decision not to include a severability clause in its bill, but rather to report a "free-standing" HMRA. *Id.* at 15. Plaintiffs argue that by reporting a separate "free-standing" title, Merchant Marine's concern that an invalid port use tax could jeopardize the entire WRDA was minimized. *Id.*

Plaintiffs appear to be correct inasmuch as Merchant Marine was concerned about the possible invalidity of the tax, and that Merchant Marine was concerned that the tax might affect the remainder of the statute. However, Merchant Marine's specific concern over the validity of the tax was that a tax on exports violated the Export Clause.[8] The Committee therefore added the severability provision (§ 116) which clearly indicates that it intended that all valid applications of section 110 remain in effect apart from the invalid applications. In this instance, the invalid application of section 110 (the port use tax) would be the tax on exports. Thus it appears Merchant

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[8] See H.R.Rep. No. 251, 99th Cong., 1st Sess., pt. 4, 23-24 (1985). *See also, id.*, at 34: "Cognizant of the debate which could be legally joined over the validity of a fee or tax on cargo, *particularly as applied to exports*, the Committee has added a new section 116 severability provision to H.R. 6." (emphasis added)

Marine intended the tax on exports to be severed from the remaining valid applications of the port use tax, rather than severing the port use tax in its entirety.

Plaintiffs' argument that the Ways and Means Committee decision not to include a severability clause but rather to report a "free-standing" bill to minimize concerns about an unconstitutional port use tax jeopardizing the entire WRDA finds no support in the legislative history. It is clear that the revenue portion reported by Ways and Means was to be under a specific title, but that it was to be part of the WRDA. It does not appear that Ways and Means considered Merchant Marine's report, as both reports were issued the same day. Moreover, there is no explanation provided by Ways and Means that sets forth any such reasoning.

From the committee reports there is no doubt that Congress struggled with the question of what would be the best basis for taxing port users. The debate largely centered on a tonnage basis versus an *ad valorem* basis, with a tonnage tax levying its burden more on bulk cargoes, and an *ad valorem* tax levying its burden more on containerized manufactured goods. *See, e.g.*, S.Rep. No. 126, 99th Cong., 1st Sess. 9 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6646-47; S.Rep. No. 228, 99th Cong., 1st Sess. 5-6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6710. It is also clear that Congress desired an equitable and uniform tax. *Id.* What is not clear, however, is how invalidating exports alone would generate inequities that Congress attempted to avoid in selecting one basis over another. It is also not clear that Congress intended to eliminate the whole tax in the event the tax on exports were held invalid.

Without more support, the Court feels it unwise to speculate as to Congress' intent in removing severability from the revenue provisions--as set forth in the Merchant Marine Report, to the general provisions of the WRDA--as set forth in

the Conference Report and in the statute. Therefore, the Court will not adopt Plaintiffs' interpretation of the legislative history of the severability clause. In sum, the legislative history of the severability clause and of the HMT does not provide strong evidence that Congress intended the entire tax to be invalidated should a portion of it be invalidated. Congress intended to tax "any port use." However, Congress' powers to tax are prescribed by the Export Clause. Congress provided for severability in the event provisions of the WRDA were held invalid. Congress did not provide language in the WRDA demonstrating its intent to have the entire HMT severed from the WRDA in the event a portion of the HMT was held unconstitutional. The legislative history, while it indicates Congress was aware of the possibility of the tax on exports being invalid, is far from clear as to Congress' intention should the tax on exports be so declared. Hence there is not evidence in the language, structure, or legislative history strong enough to overcome the presumption in favor of severability that attaches when Congress includes a severability clause in a statute. The Court therefore is unable to conclude that Congress would not have enacted the HMT absent the tax on exports.

Conclusion

Upon review of all of the papers filed in this case, the Court finds that the issue of severability is solely an issue of law which properly may be decided by summary judgment. The Court holds, as a matter of law, that those portions of the HMT that apply to exports, and are thus unconstitutional in accordance with this Court's opinion in *U.S. Shoe, i.e.*, 26 U.S.C. §§ 4461(c)(1)(B) and 4461(c)(2)(A), are severable from the remainder of the HMT, in particular those portions of the statute that involve Plaintiffs' operations as shippers providing passenger services. Accordingly, it is hereby ORDERED that

Plaintiffs' motion for summary judgment on Count IV of their second amended complaint is denied, it is further ORDERED that Defendant respond to Plaintiffs' motion for partial summary judgment within 60 days of the date of this order.

The Court, in *U.S. Shoe*, held that the HMT is unconstitutional with respect to exports. This Court now holds that the invalid export provisions of the HMT are severable from the valid portions. The issue of constitutionality is currently on appeal, as previously discussed. The Court believes that both the issue of constitutionality and the issue of severability are threshold issues which ultimately should be resolved prior to addressing the remaining issues in this case. Furthermore, while the Court concludes that the language, structure, and history of the WRDA demonstrates an intent to sever invalid from valid portions of the HMT, the legislative history of the WRDA also reflects Congress' concern over validity of the tax on exports, as well as its struggle over the proper basis to tax port use. Therefore, pursuant to 28 U.S.C. § 1292(d)(1), the Court finds that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

APPENDIX D

UNITED STATES CONSTITUTION ARTICLE I--THE CONGRESS

Section 9, Clause 5. Taxes or Duties on Exports From States

No Tax or Duty shall be laid on Articles exported from any State.

APPENDIX E

UNITED STATES PUBLIC LAWS
99th Congress - Second Session
Convening January 21, 1986

PL 99-662 (HR 6)
November 17, 1986

WATER RESOURCES DEVELOPMENT ACT OF 1986

TITLE XIV - REVENUE PROVISIONS

SEC. 1401. SHORT TITLE.

This title may be cited as the "Harbor Maintenance Revenue Act of 1986".

SEC. 1402. IMPOSITION OF HARBOR MAINTENANCE TAX.

(a) GENERAL RULE. - Chapter 36 of the Internal Revenue Code of 1954 (relating to certain other excise taxes) is amended by inserting after the chapter heading the following new subchapter:

Subchapter A - Harbor Maintenance Tax

"Sec. 4461. Imposition of tax.

"Sec. 4462. Definitions and special rules.

"SEC. 4461. IMPOSITION OF TAX.

"(a) GENERAL RULE. - There is hereby imposed a tax on any port use.

"(b) AMOUNT OF TAX. - The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.04 percent of the value of the commercial cargo involved.

"(c) LIABILITY AND TIME OF IMPOSITION OF TAX. –

"(1) LIABILITY. – The tax imposed by subsection (a) shall be paid by –

"(A) in the case of cargo entering the United States, the importer,

"(B) in the case of cargo to be exported from the United States, the exporter, or

"(C) in any other case, the shipper.

"(2) TIME OF IMPOSITION. – Except as provided by regulations, the tax imposed by subsection (a) shall be imposed –

"(A) in the case of cargo to be exported from the United States, at the time of loading, and

"(B) in any other case, at the time of unloading.

"SEC. 4462. DEFINITIONS AND SPECIAL RULES.

"(a) DEFINITIONS. – For purposes of this subchapter –

"(1) PORT USE. – The term 'port use' means –

"(A) the loading of commercial cargo on, or

"(B) the unloading of commercial cargo from, a commercial vessel at a port.

"(2) PORT. –

"(A) IN GENERAL. – The term 'port' means any channel or harbor (or component thereof) in the United States, which –

"(i) is not an inland waterway, and

"(ii) is open to public navigation.

"(B) EXCEPTION FOR CERTAIN FACILITIES. – The term 'port' does not include any channel or harbor with respect to which no Federal funds have been used since 1977 for construction, maintenance, or operation, or which was deauthorized by Federal law before 1985.

"(C) SPECIAL RULE FOR COLUMBIA RIVER. – The term 'port' shall include the channels of the Columbia River in the States of Oregon and Washington only up to the downstream side of Bonneville lock and dam.

"(3) COMMERCIAL CARGO. –

"(A) IN GENERAL. – The term 'commercial cargo' means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.

"(B) CERTAIN ITEMS NOT INCLUDED. – The term commercial cargo' does not include –

"(i) bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or

"(ii) fish or other aquatic animal life caught and not previously landed on shore.

"(4) COMMERCIAL VESSEL. –

"(A) IN GENERAL. – The term 'commercial vessel' means any vessel used –

"(i) in transporting cargo by water for compensation or hire, or

"(ii) in transporting cargo by water in the business of the owner, lessee, or operator of the vessel.

"(B) EXCLUSION OF FERRIES. –

"(i) IN GENERAL. – The term 'commercial vessel' does not include any ferry engaged primarily in the ferrying of passengers (including their vehicles) between points within the United States, or between the United States and contiguous countries.

"(ii) FERRY. – The term 'ferry' means any vessel which arrives in the United States on a regular schedule during its operating season at intervals of at least once each business day.

"(5) VALUE. –

"(A) IN GENERAL. – The term 'value' means, except as provided in regulations, the value of any commercial cargo as determined by standard commercial documentation.

"(B) TRANSPORTATION OF PASSENGERS. – In the case of the transportation of passengers for hire, the term 'value' means the actual charge paid for such service or the prevailing charge for comparable service if no actual charge is paid.

"(b) SPECIAL RULE FOR ALASKA, HAWAII, AND POSSESSIONS. –

"(1) IN GENERAL. – No tax shall be imposed under section 4461(a) with respect to –

"(A) cargo loaded on a vessel in a port in the United States mainland for transportation to Alaska, Hawaii, or any possession of the United States for ultimate use or consumption in Alaska, Hawaii, or any possession of the United States,

"(B) cargo loaded on a vessel in Alaska, Hawaii, or any possession of the United States for transportation to the United States mainland for ultimate use or consumption in the United States mainland,

"(C) the unloading of cargo described in subparagraph (A) or (B) in Alaska, Hawaii, or any possession of the United States, or in the United States mainland, respectively, or

"(D) cargo loaded on a vessel in Alaska, Hawaii, or a possession of the United States and unloaded in the State or possession in which loaded.

"(2) CARGO DOES NOT INCLUDE CRUDE OIL WITH RESPECT TO ALASKA. – For purposes of this subsection, the term 'cargo' does not include crude oil with respect to Alaska.

"(3) UNITED STATES MAINLAND. – For purposes of this subsection, the term 'United States mainland' means the continental United States (not including Alaska).

"(c) COORDINATION OF TAX WHERE TRANSPORTATION SUBSECT TO TAX IMPOSED BY SECTION 4042. – No tax shall be imposed under this subchapter with respect to the loading or unloading of any cargo on or from a vessel if any fuel of such vessel has been (or will be) subject to the tax

imposed by section 4042 (relating to tax on fuel used in commercial transportation on inland waterways).

"(d) NONAPPLICABILITY OF TAX TO CERTAIN CARGO. –

"(1) IN GENERAL. – Subject to paragraph (2), the tax imposed by section 4461(a) shall not apply to bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country.

"(2) IMPOSITION OF CHARGES. – Paragraph (1) shall not apply to any cargo exported to Canada or Mexico –

"(A) during the period –

"(i) after the date on which the Secretary determines that the Government of Canada or Mexico (as the case may be) has imposed a substantially equivalent tax, fee, or charge on commercial vessels or commercial cargo utilizing ports of such country, and

"(ii) subject to subparagraph (B), before the date on which the Secretary determines that such tax, fee, charge has been discontinued by such country, and

"(B) with respect to a particular United States port (or to any transaction or class of transactions at any such port) to the extent that the study made pursuant to section 1407(a) of the Water Resources Development Act of 1986 (or a review

thereof pursuant to section 1407(b) of such Act) finds that –

"(i) the imposition of the tax imposed by this subchapter at such port (or to any transaction or class of transactions at such port) is not likely to divert a significant amount of cargo from such port to a port in a country contiguous to the United States, or that any such diversion is not likely to result in significant economic loss to such port, or

"(ii) the nonapplicability of such tax at such port (or to any transaction or class of transactions at such port) is likely to result in significant economic loss to any other United States port.

"(e) EXEMPTION FOR UNITED STATES. – No tax shall be imposed under this subchapter on the United States or any agency or instrumentality thereof.

"(f) EXTENSION OF PROVISIONS OF LAW APPLICABLE TO CUSTOMS DUTY. –

"(1) IN GENERAL. – Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount

which bears a similar relationship to the value of the cargo.

"(2) JURISDICTION OF COURTS AND AGENCIES. – For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty.

"(3) ADMINISTRATIVE PROVISIONS APPLICABLE TO TAX LAW NOT TO APPLY. – The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes.

"(g) SPECIAL RULES. – Except as provided by regulations –

"(1) TAX IMPOSED ONLY ONCE. – Only 1 tax shall be imposed under section 4461(a) with respect to the loading on and unloading from, or the unloading from and the loading on, the same vessel of the same cargo.

"(2) EXCEPTION FOR INTRAPORT MOVEMENTS. – Under regulations, no tax shall be imposed under section 4461(a) on the mere movement of cargo within a port.

"(h) REGULATIONS. – The Secretary may prescribe such additional regulations as may be necessary to carry out the purposes of this subchapter including, but not limited to, regulations –

"(1) providing for the manner and method of payment and collection of the tax imposed by this subchapter,

"(2) providing for the posting of bonds to secure payment of such tax,

"(3) exempting any transaction or class of transactions from such tax where the collection of such tax is not administratively practical, and

"(4) providing for the remittance or mitigation of penalties and the settlement or compromise of claims."

APPENDIX F

UNITED STATES CODE

TITLE 33. NAVIGATION AND NAVIGABLE WATERS

CHAPTER 36–WATER RESOURCES DEVELOPMENT

SUBCHAPTER V–GENERAL PROVISIONS

§ 2304. Separability

If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act, shall not be affected thereby.

APPENDIX G

THE RIGHT HONOURABLE

SIR LEON BRITTAN, QC
VICE-PRESIDENT OF THE EUROPEAN COMMISSION

RUE DE LA LOI 200, 1049 BRUXELLES
WETSTRAAT 200, 1010 BRUSSELS
Tel 295 25 14
295 26 10

Brussels, 20 August, 1999

Dear Charlene,

On 29 March 1999, you wrote to me announcing a draft Bill by the Administration proposing a Harbor Services Fee (HSF). On 7 May 1999, the Commission received a copy of this draft legislation from your services. Since then, the Commission has been analysing and discussing the proposal and its implications internally, with EC Member states and with EC industries affected. We have also compared the proposal with the criteria for reform I had set out in annex to my letter of 19 June 1998, when I declared my willingness not to proceed with further WTO action against the Harbor Maintenance Tax (HMT) on condition that satisfactory reform were adopted before 1 January 2000.

While I sincerely appreciate your efforts to resolve the WTO problems of the HMT, the proposal the Administration has made to replace the HMT with a new fee is far from

Ambassador Charlene Barshefsky
United States Trade Representative
Executive Office of the President
Washington DC 20508

satisfactory. It fails to meet several of the criteria I had mentioned. The new fee would not be a true user fee, but a tax. This tax would directly and significantly affect the profit and loss account of EC shipping lines, which will be asked to bear a disproportionate burden to finance activities that benefit the entire US economy. EC goods will continue to be negatively affected. The WTO legal difficulties encountered with the HMT would not therefore be resolved by the HSF. You will find our specific comments annexed to this letter. These comments show clearly the reasons for the EC's dissatisfaction with the Administration's current proposal.

The HSF will therefore have to be treated as a priority item for discussion in the TEP framework. The EC stands ready to work intensively with the Administration in this framework in an effort to resolve the significant problems we see in the HSF, as currently drafted. I hope the Administration will be open to take the EC concerns into account and modify the proposal in an appropriate manner. We reserve the EC's position as to the WTO compatibility of any reform based on the current proposal and the actions the EC would take in its respect.

The serious problems we see in the HSF mean that in our view this proposal should not be adopted. Neither the US nor the EC has an interest in the adoption of legislation that would fail to meet your own declared objectives of creating a true user fee and of respecting US WTO obligations.

This does not, however, mean that we could accept that the HMT remain operative on imports for an indefinite period of time. That is an entirely different matter. In my letter of 29 June 1998 I requested that the levying of HMT on imports be suspended immediately. Port operation and maintenance in the US could, as in the past, be financed from general revenues. They could be financed for at least another two years from the existing surplus, while better proposals for reform are

considered. What is not acceptable for the EC is that at present, imports alone pay for the entire operation and maintenance of US ports, to the tune of $500 million per year. US exports pay nothing. Collections on US domestic shipments amount to around $45 million only. This discriminatory application of a fee that is not justified in the first place simply cannot continue. Therefore, should the HMT continue to be levied on imports after 1 January 2000, the Community intends to initiate WTO panel action against the HMT.

/s/ Leon Brittan

Leon Brittan

Supreme Court, U.S.
FILED
JUN - 2
CLERK

Nos. 99-1596 and 99-1600

In the Supreme Court of the United States

CARNIVAL CRUISE LINES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PRINCESS CRUISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the harbor maintenance tax imposed by 26 U.S.C. 4461 continues in force as applied to imports, domestic trade, and the carriage of passengers, notwithstanding this Court's holding in *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 370 (1998), that the tax violated the Export Clause "as applied to exports."

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In the Supreme Court of the United States

No. 99-1596

CARNIVAL CRUISE LINES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 99-1600

PRINCESS CRUISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 99-1596 (Pet. App. 1a-16a)[1] is reported at 200 F.3d 1361, and its opinion in No. 99-1600 (99-1600 Pet. App. 1a-21a) is reported at 201 F.3d 1352. The opinions of the Court of International Trade in No. 99-1596 (Pet. App. 17a-23a, 24a-39a) are reported at 8 F. Supp. 2d 877 and 929 F.

[1] Unless otherwise noted, references are to the petition and the petition appendix in No. 99-1596.

Supp. 1570, and its opinion in No. 99-1600 (99-1600 Pet. App. 22a-31a) is reported at 15 F. Supp. 2d 801.

JURISDICTION

The judgments of the court of appeals were entered on January 5, 2000. The petition for a writ of certiorari in No. 99-1596 was filed on April 3, 2000, and the petition in No. 99-1600 was filed on April 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Water Resources Development Act of 1986 (WRDA), Pub. L. No. 99-662, 100 Stat. 4082, is a comprehensive statute designed to improve the nation's ports and harbors. Title XIV of the WRDA comprises the Harbor Maintenance Revenue Act of 1986, 26 U.S.C. 4461 *et seq.*, which imposes an *ad valorem* tax on port use by commercial importers, exporters, domestic shippers, and passenger liners (the harbor tax or HMT) in order to help fund the WRDA's harbor improvement programs. The harbor tax is imposed on "any port use," and is to be paid by the "importer," "exporter," or "shipper" on the basis of the value of the "commercial cargo" imported, exported, or shipped. 26 U.S.C. 4461(a)-(c). "Commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. 4462(a)(3)(A). Revenue from the tax is placed in a Harbor Maintenance Trust Fund, from which funds are drawn to improve the Nation's ports and harbors. 26 U.S.C. 9505 (1994 & Supp. IV 1998).

In *United States* v. *United States Shoe Corporation*, 523 U.S. 360, 363, 370 (1998), this Court held that the HMT is a "tax," rather than a "user fee," and therefore

"violates the Export Clause [U.S. Const. Art. I, § 9, Cl. 5] as applied to exports."

2. Petitioners operate commercial cruise ships. The United States Customs Service assesses the harbor tax on the value of all passenger travel that visits a port covered by the tax. See 26 U.S.C. 4462(a)(5)(B) (defining "value" of passenger transportation). Petitioners brought these suits in the United States Court of International Trade (CIT) challenging the Customs Service's manner of assessing the tax. Petitioners also claimed that if the HMT is unconstitutional as applied to exported goods, then it cannot be applied to passenger travel either, because the two applications are not "severable." Pet. App. 18a-19a.

In its first opinion in No. 99-1596 (Pet. App. 24a-39a), the CIT held that "the invalid export provisions of the HMT are severable from the valid portions" (*id.* at 39a). In its second opinion (*id.* at 17a-23a), issued after this Court's decision in *United States Shoe*, the CIT concluded that because "levying a tax on the value of commercial cargo loaded for export" violates the Export Clause, because the statute imposing the HMT "equate[s] passengers with cargo," and because the term "embark" (used of passengers) "is * * * synonymous with the term loading," it must follow that under "the ruling in *U.S. Shoe* voiding the HMT on the loading of cargo, * * * the HMT with respect to passengers runs afoul of the Export Clause of the Constitution." Pet. App. 22a- 23a. The court reached the same conclusion with respect to constitutionality in No. 99-1600. 99-1600 Pet. App. 28a-30a.

3. The court of appeals reversed in both cases. Pet. App. 1a-16a; 99-1600 Pet. App. 1a-21a.[2] The court rejected (Pet. App. 10a-16a) petitioners' argument, in support of the CIT's judgment, that the harbor tax cannot be imposed on the value of passenger transportation because that application cannot be severed from the tax's unconstitutional application to exported goods.[3]

The court first observed (Pet. App. 10a) that the WRDA "contains a broad severability clause." See 33 U.S.C. 2304.[4] Relying on this Court's decision in *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678 (1987), the court reasoned that the existence of such a clause "creates a presumption" in favor of severance, although a court must still consider whether the statute thus "created" is "legislation that Congress would not have enacted." Pet. App. 11a (quoting *Alaska Airlines*, 480 U.S. at 685, 687).

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[2] The court's opinion in No. 99-1600 incorporates by reference its discussion of the constitutional issue in No. 99-1596. 99-1600 Pet. App. 10a-11a. After ruling that the HMT is constitutional as applied to carriage of passengers, the court in No. 99-1600 also held that the tax is properly assessed when a ship stops in a covered port, even if the cruise begins from and ends in non-covered ports, and that petitioner Princess is responsible for a separate "arriving passenger fee" with respect to certain passengers. *Id.* at 11a-20a. Petitioner Princess does not challenge either of the latter holdings in this Court.

[3] Petitioners have not attempted to defend the CIT's reasoning, either before the court of appeals (Pet. App. 7a) or in this Court (Pet. 6 n.2).

[4] The court ruled that the severability clause applies to the provisions of the WRDA that enacted the HMT, just as it does to other provisions of the WRDA. Pet. App. 14a-15a.

The court found no sufficient reason to conclude that Congress "would not have enacted the remainder of the Harbor Tax had it known that the application of the tax to exports would be invalid." Pet. App. 12a. Noting that Congress chose to create the tax even though it was aware that application to exports might be unconstitutional, the court observed that the tax can continue to "function effectively and serve [its] purpose" of funding port and harbor improvements under the WRDA "even after the invalid application has been excised." *Ibid.*

As a textual matter, the court rejected (Pet. App. 12a-13a) petitioners' argument that because Congress did not enact a separate tax applicable only to "exports," there is nothing that can be "severed" from the statute, and the tax imposed on "any port use" may only be stricken in its entirety, even as applied to "cargo" other than exports. The general language imposing the tax, the court pointed out, "must be read in conjunction with the other statutory provisions," including those specifying when and by whom the unconstitutional tax on exports was to have been paid, which could be excised without affecting other applications of the tax. *Ibid.*

The court likewise found nothing in the legislative history to persuade it that Congress "would not have imposed the Harbor Tax without applying it to exports." Pet. App. 13a. Although Congress chose to impose a value-based rather than volume-based tax, it did so in order to avoid "disproportionately burden[ing] bulk commodities," which accounted for a substantial portion of both export and domestic shipping; and Congress's "'overriding intention' in enacting the tax was to provide revenue to fund port and harbor maintenance and improvement projects," not to "insur[e] that

exports properly contributed their fair share of the tax." *Id.* at 13a-14a. Moreover, although the history did reflect some concern that taxing imports but not exports could lead to conflicts with the United States' trading partners, the court noted that concerns about the effect of judicial rulings invalidating one application of the tax but not the other were "speculative and conjectural," and could be addressed by the Executive and Legislative Branches should the need arise. *Id.* at 15a-16a.

ARGUMENT

1. As the court of appeals recognized (Pet. App. 11a), the question of severability is one of legislative intent: An unconstitutional provision of a statute "must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). Petitioners argue (Pet. 10-17) that the Federal Circuit misapplied that test in this case, because "Congress would not have enacted" a tax that applies, as the HMT does after *United States Shoe*, to "imports, coastwise trade, and passenger cruises, but not [to] exports." Pet. 10. The court below, however, properly reached the contrary conclusion, and its determination does not warrant review by this Court.

a. The plain language of the WRDA, which enacted the harbor tax, supports the court of appeals' determination. The Act specifically provides that:

> If any provision of this Act, *or the application of any provision of this Act to any person or circumstance*, is held invalid, *the application of such*

> *provision to other persons or circumstances*, and the remainder of this Act, shall not be affected thereby.

33 U.S.C. 2304 (emphasis added).[5] Although such provisions may not always be dispositive with respect to particular severability questions, see Pet. App. 10a-11a, they provide a strong indication of the relevant legislative intent, and indeed "create[] a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686. That presumption may be overcome only by "strong evidence" to the contrary. *Ibid.*

Petitioners argue that because 26 U.S.C. 4461(a) states a "general rule" imposing a tax on "any port use," while the use of ports to export goods cannot be taxed under *United States Shoe*, there is in this case "no provision to sever." 99-1600 Pet. 8; Pet. 11, 19 n.11. They contend that the court of appeals should therefore have invalidated the HMT in its entirety, rather than "re-draft[ing] the law" by holding that it continues to apply in cases that do not involve exports. 99-1600 Pet. 8.

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[5] Citing *United States* v. *Locke*, 120 S. Ct. 1135, 1146 (2000), petitioners renew in passing their argument that the severability clause does not apply to the provisions of the HMT. See Pet. 6 n.3, 21 n.12. The court of appeals correctly rejected that contention. Pet. App. 14a-15a. The clause appears in Title IX of the WRDA, entitled "General Provisions," and its use of the term "this Act" naturally refers to the entire WRDA—of which Title XIV, enacting the HMT, is a part. There is nothing to suggest otherwise in *Locke*, which held only that Congress intended a specifically worded savings clause in one substantive title of a statute to have a correspondingly specific and limited scope. See 120 S. Ct. at 1144, 1146.

Contrary to petitioners' suggestion, the question whether an unconstitutional application of a statute should be "severed" from its constitutional applications is not fundamentally different from the question whether a discrete, unconstitutional provision should be severed from an otherwise constitutional Act. Both are ultimately questions of legislative intent. See Nagle, *Severability*, 72 N.C. L. Rev. 203, 208 & n.24 (1993); 2 N. Singer, *Sutherland Statutory Construction* §§ 44.02-44.03 (5th ed. 1993). This Court has held that statutes could not constitutionally be applied in certain situations, without striking them down in their entirety or suggesting any such result. See, *e.g.*, *United States* v. *Grace*, 461 U.S. 171, 178-184 & n.9 (1983); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 504-507 (1985); *Wisconsin* v. *Yoder*, 406 U.S. 205, 207 n.2, 234-236 & n.22 (1972) (holding that certain aspects of state compulsory school-attendance law could not be applied to Amish parents, but expressly disclaiming (at 236) any intention to "undermine the general applicability" of those statutes); cf. *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 521 & n.26 (1981) (plurality opinion) (holding billboard ordinance unconstitutional to the extent it included prohibitions on non-commercial speech, but remanding to state court for determination whether ordinance should be "sustain[ed] * * * [in part] by limiting its reach to commercial speech").

The Court has, moreover, observed that a legislature may, through a severability clause, specifically "provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 460-461 (1992). That is exactly what Congress did in the WRDA, and the court of appeals was correct to honor that express legislative

direction. Compare 33 U.S.C. 2304, quoted above, with *Wyoming*, 502 U.S. at 461 n.14 (citing substantially identical severability provision involved in *INS* v. *Chadha*, 462 U.S. 919, 932 (1983)), and *Brockett*, 472 U.S. at 506-507 n.14 (relying in part on similar severability provision in holding that there was "no obstacle to partial invalidation" of statute).

In any event, as the court of appeals pointed out, petitioners err in seeking "to read the '[g]eneral rule' provision" in Section 4461(a) "in isolation from the remainder of the statute," rather than "in conjunction with the other statutory provisions, which explain and describe its operation." Pet. App. 13a. Section 4461(a) imposes a tax on "port use," and subsection (b) prescribes the base and rate of tax. Subsections (c) and (d) then specify who must pay the tax, and when. Those subsections differentiate expressly among exporters and others, and between exports and all other sorts of cargo. 26 U.S.C. 4461(c)(1)(B) and (c)(2)(A); see Pet. App. 2a-3a, 42a (setting out provisions). The provisions referring to exports and exporters may be straightforwardly "severe[d]" from the remainder of Section 4461, and they leave a statute that designates how the HMT is to be figured (on the value of cargo), who is to pay it (importers and shippers), and when it is to be paid (at the time of unloading). This is not, accordingly, a case in which the statute in question "nowhere sets up" the appropriate line for severance, Pet. 11 (quoting *Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973)), but rather one in which "the text * * * identifie[s] a clear line" that the courts may draw. *Reno* v. *ACLU*, 521 U.S. 844, 884 (1997) (citing *Brockett* and *Grace*).[6]

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[6] Petitioners labor unsuccessfully (Pet. 18-24) to demonstrate some sort of conflict between this Court's decisions in *Reno* and

b. Relying on legislative history and the foreign-policy sensitivity of questions involving international trade, petitioners argue (Pet. 11-17) that Congress would not have enacted the HMT if it could not be applied to exports, as well as to imports, passenger transportation, and domestic cargo. As the court of appeals reasoned (Pet. App. 12a), however, the HMT was enacted "to raise money to help fund the port and harbor improvements" envisioned by the WRDA.[7] The tax "continue[s] to perform that function, although on a lesser scale," even though it may not be applied to exports. *Ibid.*

Obviously, Congress would have *preferred* for the tax to apply to exports as well. Any inquiry into severability is, from the affected legislature's point of view, an inquiry into what option is second-best. Here, the second-best solution is manifest. At the time it considered and passed the WRDA, Congress was aware that the Export Clause might bar application of the HMT to exports. Pet. App. 12a. It nonetheless enacted the tax, along with the severance clause discussed

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Alaska Airlines. *Reno* refused to preserve the possibility that there might be some constitutional applications of a ban on certain "indecent" speech, in part because the challenge before it was facial rather than "as applied," and in part because the "open-ended" statute in question provided "no guidance whatever for limiting its coverage." 521 U.S. at 883-884. Nothing in that analysis is inconsistent with *Alaska Airlines*—or, as the text demonstrates, with the court of appeals' decision in this case. See also *Mille Lacs*, 526 U.S. at 191 (restating traditional test).

[7] Enactment of the HMT to offset port and harbor maintenance costs was an essential element of the WRDA package. See H.R. Rep. No. 251, 99th Cong., 1st Sess. Pt. 4, at 42 (1985); S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985); 132 Cong. Rec. 4940 (1986) (statement of Sen. Stafford).

above.[8] As the court of appeals rightly concluded (*id.* at 13a-16a), nothing in the legislative history demonstrates that if Congress had known it could not impose the HMT on exports, it would instead have chosen to impose no tax at all.

Petitioners stress (Pet. 12) Congress's desire to impose a "uniform" tax. As we have noted, what Congress thought ideal is not the relevant inquiry, because the starting point here is that the Constitution has precluded that approach. In any event, as the court below recognized (Pet. App. 13a-14a), the concern with respect to "uniformity" was to avoid disadvantaging shippers of high-volume products such as coal in relation to shippers of high-value products such as computer chips—not to avoid disadvantaging importers, domestic shippers, or cruise lines in relation to exporters. See H.R. Rep. No. 251, 99th Cong., 1st Sess. Pt. 4, at 24-26 (1985). To the extent that Congress was troubled by the relative tax burdens on exports and imports, the concern was clearly to avoid overburdening *exports*, not to achieve equity for importers or passenger carriers. See Pet. 12-13 & n.7.

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[8] The House Merchant Marine and Fisheries Committee, on whose report petitioners rely (Pet. 12-14), recommended passage of a clause providing specifically that if the HMT were held "invalid in one or more of its applications," it should "remain[] in effect in all valid applications that are severable from the invalid applications." Pet. App. 14a (quoting H.R. Rep. No. 251, *supra*, at 13). "The concern of the Committee * * * was, for example, that the constitutional arguments that had been made against imposing a tax on exports might result in the legislation being declared invalid and it [was] the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid." *Id.* at 30; see also *id.* at 34. Ultimately, Congress adopted one severability clause for the entire WRDA.

Nor does evidence in the legislative history concerning Congress's natural concern over relations with our trading partners, see Pet. 13-17, justify an inference that if Congress could not tax both exports and travel on cruise ships, it would have chosen to tax neither. The continued need for funding for ports and harbors, and the continued efficacy of the HMT in providing that funding even if it cannot be applied to exports, are clear and concrete. See, *e.g.*, U.S. Army Corps of Engineers, *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1998*, at 17 (Dec. 1999). By contrast, the merit and likely ultimate consequences of complaints by our trading partners, based on the invalidation of the HMT as applied to exports, are at best unclear even now. See Pet. App. 16a. At the time the WRDA was passed they would have been wholly speculative. Congress's possible awareness that invalidation of the HMT as applied to exports might lead to future trade disputes therefore provides no basis for refusing to enforce the tax to the extent that it is constitutional—particularly in light of Congress's specific directive in the severability clause.[9] In any event, if and when such disputes materialize, their resolution is a matter for the President and for Congress, which is fully capable of reconsidering the design and advisability of the HMT, in light of *United States Shoe*, if it wishes to do so.

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[9] Even when the pertinent issues are squarely raised, Congress does not always choose to avoid such disputes. Cf. 19 U.S.C. 2504(a) ("No provision of any trade agreement * * * nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.").

2. Petitioners suggest the existence of "conflicts and confusion * * * among the courts of appeals" on the proper approach to severance questions (Pet. 18), but the two cases they cite do not support that suggestion.

In *United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297, 1299 (9th Cir. 1998), the court applied the traditional severance test, asking whether Congress would have enacted the statute at issue "in the absence of one of its key provisions," which this Court had invalidated. The court suggested (without holding) that the statute might have to be invalidated in its entirety, because "[m]ost likely [the statute] would not have been enacted" without the invalid enforcement mechanism. See *id.* at 1301. The court noted, however, that the statute might remain enforceable, if under particular circumstances its operation would be "close enough to what Congress had in mind." *Ibid.*

In *Ackerley Communications of Massachusetts, Inc.* v. *City of Cambridge*, 135 F.3d 210, 215 (1st Cir. 1998), the court confronted a question of severability under Massachusetts law, which involved much the same sort of inquiry as the traditional federal test applied in *Spokane Tribe*: "[W]hether [the ordinance] would have been enacted had the City Council known that it would" apply only to signs conveying commercial, as opposed to non-commercial, messages. *Ibid.* Citing *Reno* for the proposition (undisputed here) that "[s]everability clauses, though probative of legislative intent, are not conclusive" (*id.* at 215-216; compare Pet. App. 10a-11a), the court refused to read a distinction between commercial and non-commercial speech into an ordinance no part of which "allude[d] in any way to [such] a substantive distinction." 135 F.3d at 216. Nothing in that decision conflicts with anything in *Spokane Tribe*,

and nothing in either case conflicts with the decision below. See pp. 9-11 & n.6, *supra*.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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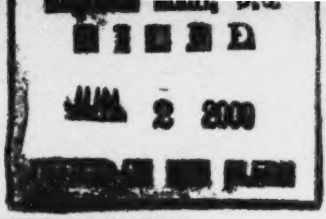
[10] There will, of course, never be any conflict on the precise question presented in this case, because challenges to the application of the HMT fall within the Federal Circuit's exclusive jurisdiction. See 28 U.S.C. 1295(a)(5), 1581(i); *United States Shoe*, 523 U.S. at 365-366.

(3)



No. 99-1596

IN THE

Supreme Court of the United States

CARNIVAL CRUISE LINES, INC.; HAL ANTILLEN, N.V.; HAL SHIPPING, LTD.; WIND SURF LIMITED; HOLLAND AMERICA LINE, N.V.; and HAL CRUISES LIMITED,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF THE INTERNATIONAL COUNCIL OF CRUISE LINES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the doctrine of severability empowers federal courts to rewrite an unconstitutional statute in order to preserve constitutional applications of the statute that are not textually distinct from its unconstitutional applications.

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IN THE

Supreme Court of the United States

No. 99-1596

CARNIVAL CRUISE LINES, INC.; HAL ANTILLEN, N.V.; HAL SHIPPING, LTD.; WIND SURF LIMITED; HOLLAND AMERICA LINE, N.V.; and HAL CRUISES LIMITED,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF THE INTERNATIONAL COUNCIL OF CRUISE LINES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amicus curiae the International Council of Cruise Lines ("ICCL") respectfully submits this brief in support of petitioners' request for certiorari.[1]

[1] Letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* represents that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners Carnival Cruise Lines, Inc., and Holland

[Footnote continued on next page]

INTEREST OF *AMICUS CURIAE*

ICCL is a Washington, D.C.-based, non-profit trade association that represents the interests of the 17 largest passenger cruise lines in the North American cruise market, and more than 50 national and international cruise industry suppliers. ICCL member lines operate 95 vessels that call upon major ports in the United States and abroad. These vessels, all of which engage in international commerce, carry nearly six million passengers each year and account for approximately 90% of the North American passenger cruise line industry. The mission of the ICCL is to participate in the lawmaking, regulatory, judicial, and policy development processes to help ensure that all legal measures applicable to the passenger cruise line industry are consistent with the industry's goals of providing a safe, secure, healthy, and cost-effective vacation and travel experience.

All of ICCL's members, as well as the millions of Americans who take cruises from U.S. ports each year, are adversely affected by the discriminatory treatment of the cruise industry mandated by the court of appeals in this case. The effect of the decision below is to compel passenger cruise lines, together with their passengers and suppliers, to bear a disproportionately large share of the Harbor Maintenance Tax at issue in this case. That result flies directly in the face of Congress's clear intent in enacting the tax, which was to provide for a uniform levy equally applicable to all commercial shipping.

[Footnote continued from previous page]
America Line, N.V., are members of ICCL, but have made no special monetary contribution to the preparation of this brief. ICCL has financed this brief solely out of general operating funds derived from annual contributions from its members and other sources.

ICCL accordingly urges the Court to grant certiorari to review the egregiously incorrect decision below.

STATEMENT

This case presents the question whether courts are permitted to rewrite unconstitutional federal statutes in order to preserve constitutional applications of such statutes from invalidation, when the constitutional applications are not textually distinct from or functionally independent of the statute's unconstitutional applications. The test for severability adopted by this Court and by numerous courts of appeals precludes severance in these circumstances, but the decision below rejects these traditional limitations on severability in favor of an all-but-standardless inquiry that vests virtually unlimited law-making discretion in the courts. This Court's review is necessary to resolve this conflict among the authorities and reject the broad usurpation of legislative power effected by the decision below.

1. In 1986, Congress enacted the Harbor Maintenance Revenue Act, Pub. L. No. 99-662, tit. XIV, §§ 1401-07, 100 Stat. 4082, 4266-73 (1986), which *inter alia* established the Harbor Maintenance Tax ("Harbor Tax"). *Id.* § 1402(a), *codified at* 26 U.S.C. § 4461-4462. As originally enacted, the Harbor Tax was an ad valorem tax imposed on "any port use." 26 U.S.C. § 4461(a). Congress defined "port use" to include "the loading of commercial cargo on, or . . . the unloading of commercial cargo from, a commercial vessel at a port," and defined "commercial cargo" as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. § 4462(a)(1)(B) & (a)(3)(A).

In *United States v. United States Shoe Corp.* ("*U.S. Shoe*"), 523 U.S. 360 (1998), this Court held that the Harbor Tax violated the Export Clause of the United States Constitution, art. I, § 9, cl. 5, as applied to exports of goods. The *U.S. Shoe* decision did not address the

question whether application of the tax to other types of commerce was also unconstitutional, or could instead be preserved by severing it from the unconstitutional portions of the statute.

2. Petitioners brought this suit in the Court of International Trade to contest the assessment and maintenance of the Harbor Tax on passenger cruises that originate, stop, or terminate in ports covered by the tax. Relying on *U.S. Shoe*, the Court of International Trade held that transportation services provided to cruise line passengers are not subject to the Harbor Tax. Pet. App. 18a-23a. The government appealed.

3. In the court of appeals, petitioners argued *inter alia* that the Harbor Tax was invalid as applied to passengers because the tax on passengers was inextricably intertwined with the unconstitutional tax on exports and thus could not be severed. Petitioners noted that because the tax on passengers was not a separate and distinct statutory provision, *see* 26 U.S.C. §§ 4461(a), 4462(a)(1)(B) & (a)(3)(A), the only way the court could sever the passenger tax from the unconstitutional tax on exports was to rewrite the statute in an impermissible manner. Pet. C.A. Br. 20-31; Pet. App. 12a.

The court of appeals disagreed, holding that the passenger tax *could* be severed from the tax on exports. Pet. App. 10a-16a. In conducting its severability analysis, the court bypassed any inquiry into whether the constitutional and unconstitutional aspects of the tax were textually or functionally independent of one another—*i.e.*, whether the tax on exports could be deleted or excised from the statute in a way that left intact the remaining applications of the tax, including the passenger tax. Instead, after noting that this Court's "decisions dealing with the severability of invalid portions of a statute have used various formulations of the appropriate test for deciding the issue," the court of appeals held that the governing test hinged entirely on whether Congress would have enacted the statute absent the tax on exports:

"'the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.'" *Id.* at 11a. Accordingly, without regard to the inextricably intertwined nature of the various elements of the Harbor Tax, the court of appeals concluded that the tax on exported goods was severable from the other aspects of the tax, because "[i]t cannot be concluded that Congress would not have enacted the remainder of the Harbor Tax had it known that the application of the tax to exports would be invalid." *Id.* at 12a.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with this Court's longstanding rule that the judicial power to sever statutes is limited to the deletion or excision of unconstitutional language. Because the tax on passengers is not textually distinct from the unconstitutional tax on exports of goods, the court of appeals' "severance" of the passenger tax necessarily entailed more than mere deletion of unconstitutional provisions or phrases. Indeed, the Federal Circuit's expansive vision of severability empowers courts to rewrite statutes under the guise of severance—a clear invasion of the Legislature's province and a far cry from the delicate "textual surgery" authorized by this Court in *Reno v. ACLU*, 521 U.S. 844, 883 (1997). Review by this Court is necessary to clarify the limits of a court's power to modify federal statutes through severance.

The Federal Circuit's test for severability also conflicts with the test applied by several other courts of appeals. Although the Federal Circuit requires only a determination that Congress would have enacted the constitutional provisions of the law absent the unconstitutional provisions, other courts require an additional step: a determination that the unconstitutional provisions are "functionally independent" of the remainder of the statute. Under this test, if the unconstitutional provisions

are so intertwined with the valid provisions that a court would have to rewrite the law to enable it to stand, severance is improper. Because the structure of the Harbor Tax is such that the taxation of exports is inextricably intertwined with the taxation of passengers and imports, the Federal Circuit was compelled to disregard the requirement of functional independence in order to uphold the latter aspects of the tax.

I. The Court Of Appeals' Test For Severability Is Inconsistent With Decisions Of This Court

The decision below is impossible to reconcile with numerous decisions of this Court that limit a court's power to sever unconstitutional aspects of a federal statute in order to preserve other provisions of the same statute. Specifically, this Court has explained that the doctrine of severability grants courts the narrow power to *delete* or *excise* unconstitutional provisions—*not* the power to rewrite a statute to ensure its constitutionality. Yet rewriting is precisely what the court of appeals did here: Given the statutory language, it is impossible to preserve the passenger tax while invalidating the tax on exported goods through the deletion or excision of unconstitutional provisions. Indeed, the court did not identify—nor could it—the specific textual excisions that would eliminate the tax on exports of goods while preserving the remaining applications of the tax.

The Federal Circuit's reconfiguration of the Harbor Tax is patently inconsistent with *Reno v. ACLU*, 521 U.S. 844 (1997), where this Court considered a challenge to two provisions of the Communications Decency Act, 47 U.S.C. § 223. In *Reno*, the Government urged that if the Court were to conclude that the provisions were insufficiently tailored to pass constitutional muster, the Court should "honor" the statute's severability clause by "construing nonseverable terms narrowly," effectively rewriting the statute to satisfy constitutional requirements. *Id.* at 882. The Court rejected this argu-

ment, explaining that "*[a] severability clause requires textual provisions that can be severed.*" *Id.* at 882 (emphasis added).

The *Reno* Court accordingly held that the constitutional elements of the statute could be left intact only "in the one place where they are, in fact, severable." *Id.* at 882-83. That one place, the Court explained, was the "indecency" provision, which outlawed "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent." *Id.* at 883 (quoting 47 U.S.C. § 223(a)). Having held the ban on "indecent" communications unconstitutional, the Court ruled that the ban on "obscene" communications could be preserved simply by deleting the words "or indecent" from the statute. *Id.* The Court explained that severance was permissible in this instance because "*the restriction of 'obscene' material enjoys a textual manifestation separate from that for 'indecent' material.*" *Id.* (emphasis added). The Court proceeded to reject the remainder of the Government's severability argument, concluding that "[i]n no other respect . . . can [the statute] be saved by such a textual surgery." *Id.* As the Court emphasized, "[t]his Court 'will not rewrite a . . .' law to conform it to constitutional requirements." *Id.* at 884-85 (quoting *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)).

Reno built directly on this Court's prior severability ruling in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995). In that case, the United States Court of Appeals for the District of Columbia Circuit invalidated the application to the executive branch of a statute prohibiting federal officers and employees from receiving honoraria, but severed and upheld the statute's application to the legislative and judicial branches. *Id.* at 463-64. The court of appeals acknowledged that it could not achieve this result merely by deleting or excising words from the statutory text:

> We cannot, as a technical matter, achieve the intended severance simply by striking the words 'officer or employee' from § 501(b), as that would invalidate the ban beyond the executive branch. . . . However, given the far greater congressional interest in banning honoraria for the legislative and judicial branches, we think it a proper form of severance to strike 'officer or employee' from § 501(b) except in so far as those terms encompass members of Congress, officers and employees of Congress, judicial officers and judicial employees.

513 U.S. at 478 n.24 (quoting *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1279 (D.C. Cir. 1993)) (emphasis eliminated). The panel majority's aggressive expansion of severability doctrine drew a sharp dissent from Judge Sentelle, who pointed out that "[i]t is settled that the duty to sever does not empower courts to 'introduce words of limitation in order to uphold the valid applications' of a challenged statute." 990 F.2d at 1295 (Sentelle, J., dissenting) (quoting Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 44.16, at 529 (4th ed. 1986)).

This Court reversed in relevant part, holding that the lower court's method of severance amounted to "tamper[ing] with the text of the statute." 513 U.S. at 478. Underscoring "[o]ur obligation to avoid judicial legislation," the Court rejected the District of Columbia Circuit's attempt to rewrite the statute through severance, choosing instead to limit relief to the parties before the Court. *Id.* at 477, 479.

Reno and *National Treasury Employees Union* reflect this Court's long-settled understanding that when a statute's constitutional applications are textually inseparable from its unconstitutional applications, severance is impermissible. For example, in *Hill v. Wallace*, 259 U.S. 44, 70 (1922), the Court held a federal statute nonseverable when the valid and invalid provisions were "so interwoven" that only a rewrite of the statutory text

would allow the law to stand. The statute's severability clause, the Court explained, "does not give the court power to amend the act" (*id.* at 71), nor does it enable "the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain." *Id.* at 70. Such a remedy would constitute "legislative work beyond the power and function of the court." *Id.*

Likewise, in *United States v. Reese*, 92 U.S. (2 Otto) 214, 221 (1875), the Court held that although a court may sever a statute "by striking out or disregarding words that are in the [challenged] section," it may not sever "by inserting [words] that are not now there." Amending a statute through the addition rather than deletion of words "would be to make a new law, not to enforce an old one"—a role that "is no part of our duty." *Id.* *See also Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (noting that under the severance doctrine, an invalid portion of a statute "may be *dropped* if what is left is fully operative as a law") (emphasis added; citation omitted).

The Federal Circuit's dismantling and reconstruction of the Harbor Tax is precisely the sort of "tamper[ing] with the text of [a] statute" that this Court has repeatedly condemned. *National Treasury Employees Union*, 513 U.S. at 478. The court below did not identify any textual phrase that could be severed in order to excise the tax on exported goods while preserving all other aspects of the tax, and for good reason: There is none. Plainly, 26 U.S.C. § 4462(a)(1)(A), which includes "the loading of commercial cargo" within the category of "port use" subject to the tax, cannot be severed, because if that provision is severed, then not merely the loading of *goods* but also the loading of *passengers* would be exempted from the tax—a result that the court below squarely rejected. Similarly, the statutory revision mandated by the court below cannot be achieved by excising portions of the statutory definition

of "commercial cargo," since it is impossible to delete words from the phrase "any cargo transported on a commercial vessel, including passengers transported for compensation or hire," in a manner that leaves intact the statute's application to passengers and *imported* goods (as the court below did) while eliminating the statute's application to *exported* goods.[2]

Thus, there is no provision that can be deleted in order to achieve the result reached below; instead, the Federal Circuit had to re-draft the law Congress enacted by effectively inserting the phrase "exported goods" into Congress' itemized list of exclusions from the tax. *See* 26 U.S.C. § 4462(a)(3)(B) (identifying specific exclusions from the category of "commercial cargo" subject to the tax). Because the passenger tax does not "enjoy[ ] a textual manifestation separate from" the tax on exports, *Reno*, 521 U.S. at 883, the court of appeals plainly erred in severing the former from the latter.

The decision below thus violates well-settled rules governing the judicial power to declare laws unconstitutional. If left uncorrected, it will serve as an invitation for courts to invade the legislative domain and add new, judicially created language to federal statutes under the guise of severance. The conflict between this Court's

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[2] The statute's provision stating that "the exporter" shall pay the tax "in the case of cargo to be exported from the United States," 26 U.S.C. § 4461(c)(1)(B), could perhaps be excised while leaving the remainder of the statute intact, but that excision would not achieve the result adopted below—or that mandated by this Court's decision in *U.S. Shoe*—because the tax would remain applicable to exported goods; it would simply by paid by "the shipper" rather than the "exporter." 26 U.S.C. § 4461(c)(1)(C) (providing that "in any other case," the tax shall be paid by "the shipper").

decisions and the rule of law announced below requires resolution by this Court.

II. The Circuits Are Divided Over The Proper Test For Severability

The Federal Circuit's test for severability conflicts directly with the two-part test employed by the First, Third, Eighth, Ninth, and Eleventh Circuits. In the decision below, the court of appeals held that "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." Pet. App. 11a (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)). Yet the court of appeals ignored the second element of the test for severability employed by several other circuits—a determination of "functional independence."

The functional independence requirement is a means of ensuring that courts observe the limits on their power to sever federal statutes, in keeping with the principles repeatedly enunciated by this Court in the cases discussed in part I above. A statutory provision is functionally independent only if it is textually distinct from the invalid provisions and can operate fully and independently standing alone. *See, e.g., Alaska Airlines*, 480 U.S. at 684 ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently."); *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936) ("in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another"). Under the functional independence test employed by several courts of appeals, even if a court concludes that Congress would have enacted the statute absent the unconstitutional aspects, severance is improper if the unconstitutional provisions are so interwoven with the remainder of the statute that mere deletion will not suffice.

The Ninth Circuit explicated this two-step approach in *Board of Nat. Resources v. Brown*, 992 F.2d 937, 948 (9th Cir. 1993), where it held that the question of severability is not determined exclusively by an inquiry into whether Congress would have enacted the statute absent its unconstitutional provisions; instead, a court must also consider "whether the unconstitutional provisions are 'functionally independent' from the remainder" of the statute. The Ninth Circuit explained that "an unconstitutional provision is not considered 'functionally independent' if the 'valid and invalid provisions [are] so intertwined that the Court would have to rewrite the law to allow it to stand.'" *Id.* (quoting *Alaska Airlines*, 480 U.S. at 684). Conversely, an unconstitutional provision *is* functionally independent if "'its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation.'" *Id.* (quoting *United States v. Jackson*, 390 U.S. 570, 586 (1968)).

Likewise, in *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 76 (1st Cir. 1990) (en banc), *vacated on other grounds sub nom.*, *Sullivan v. Massachusetts*, 500 U.S. 949 (1991), the First Circuit held that "[i]n examining severability a court must examine the functional independence of the valid and invalid provisions *and* the intent of the enacting legislature" (emphasis added). The court explained that because the valid and invalid provisions of the challenged federal regulatory scheme were so closely interconnected, "the radical dissection necessary would leave the statute with little resemblance to that intended by the legislature." *Id.* at 76 (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986) (brackets omitted)). Accordingly, the court held, severance was improper. *See also Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1124, 1136 (1st Cir. 1984) (stating test for severability as requiring examination of "(1) the *functional independence* of valid and invalid statutory provisions, and (2) the intent of the enacting legisla-

ture") (emphasis added; citation omitted), *modified on rehearing en banc*, 762 F.2d 1137 (1st Cir. 1985).

In *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854 (8th Cir. 1998), the Eighth Circuit held that the portion of the Religious Freedom Restoration Act ("RFRA") applicable to the States (and declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997)) was severable from the portion applicable to the federal government. The court reasoned that severance was proper because "RFRA's protection against federal interference with religious liberties is *independent and distinct* from its protection against state interference." *Id.* at 859 (emphasis added); *see also id.* (quoting *Alaska Airlines*, 480 U.S. at 684, for the proposition that severance is impermissible "'if the balance of the legislation is incapable of functioning independently'"). Indeed, the text of RFRA easily permitted severance in this manner: Because RFRA applied "to all Federal and State law," 42 U.S.C. § 2000bb-3(a), the court could achieve the desired result simply by deleting the words "and State."

The Third Circuit also follows this two-step approach, in direct contrast to the test for severability announced by the court below. In *EEOC v. Westinghouse Elec. Corp.*, 765 F.2d 389 (3d Cir. 1985), the court explained that "[t]he severability inquiry is two-pronged: (1) are the valid and invalid statutory provisions *functionally independent*; and (2) did the legislature intend the provisions to be severable?" *Id.* at 392 n.2 (emphasis added).[3]

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[3] *See also United States v. Romero-Fernandez*, 983 F.2d 195, 196 (11th Cir. 1993) ("In determining whether to sever a constitutionally flawed provision, courts should consider whether the balance of the legislation is incapable of functioning independently."); *Estate of Langan v. Nebraska*, 63

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Not only does the Federal Circuit's single-step test *for severability directly conflict with the two-step test* applied by the First, Third, Eighth, Ninth, and Eleventh Circuits, it is deeply flawed in that it allows a court complete freedom to dismantle and rebuild federal statutes—as long as the court concludes that the revised version is something Congress would have enacted. Such a "limitation" on judicial power is plainly no limitation at all. The functional independence requirement, by contrast, ensures that any revisions made by a severing court are consistent with the text and structure of the statute itself, not merely with the court's necessarily subjective and hypothetical assessment of what Congress might have been willing to enact.

In sum, this case squarely presents an important and recurring question that has generated a conflict among the courts of appeals.[4] This Court should grant certio-

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F. Supp. 2d 1025, 1027 (D. Neb. 1999) (refusing to sever when it was unclear "how the arguably constitutional portion of the legislation . . . can function independently from that portion of the statute . . . that is violative of the Eleventh Amendment when both concepts are defined in the statutes as one unitary concept").

[4] Federal courts of appeals applying severability doctrine in the context of constitutional challenges to state statutes have similarly held that courts are limited to excising or deleting unconstitutional language and may not rewrite statutes in order to preserve constitutional applications while invalidating unconstitutional ones. *See, e.g., Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991) ("the general federal rule is that courts do not rewrite statutes to create constitutionality"); *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) ("We should not . . . treat a severability clause as an invitation from the legislature to write whatever statute we can fashion from the constitutional

[Footnote continued on next page]

rari to resolve this conflict and adopt the majority view that functional independence is a prerequisite to severability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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remnants as augmented by our imagination."); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985) ("[E]ven the broadest severability clause does not permit a federal court to rewrite as oppose to excise. Rewriting is work for the legislature . . . .").

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Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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The Brief in Opposition ("Opp.") filed by the United States (hereafter, the "Government") for the most part recasts as argument the flawed reasoning in the court of appeals' decision. That courts' legal errors and the reasons for granting review of its decision have been addressed in the Petition for Writ of Certiorari ("Pet."). On several issues, however, the Government's defense of the court of appeals' decision fails to turn square corners. These points are addressed briefly below.

1. The Government Would Have This Court Sanction Judicial Intrusion Into The Legislature's Prerogatives Regarding Federal Tax Programs

The Government's position rests, at bottom, on the assertion that, when confronted with a severability question, the courts should make "an inquiry into what option is second-best." Opp. 11. As this Court has held, however, when a court invalidates a substantial portion of a statute, what is "second-best" is for the legislature, not the courts, to decide. *United States v. Treasury Employees*, 513 U.S. 454, 479 & n.26 (1995) ("We believe the Court of Appeals properly left to Congress the task of drafting a narrower statute"; for the court to do so "involves a far more serious invasion of the legislative domain" than striking the entire statute); *Virginia v. National Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (unless a statute is "readily susceptible" to a narrow construction, the Court "will not rewrite [the law] to conform to constitutional requirements").

The Government seeks to overcome this fundamental problem by positing that "nothing in the [HMRA's] legislative history demonstrates that, if Congress had known it could not impose the [tax] on exports, it would instead have chosen no tax at all." Opp. 12. This observation, even if true, is irrelevant. As the Government acknowledges, the critical question is not whether Congress would have chosen no tax over a truncated tax, but whether Congress would have enacted the severed statute in the first instance. Opp. 6. The HMRA's

legislative history shows that Congress considered a variety of tax systems before it adopted the HMRA's *ad valorem* approach.[1/] Had Congress been certain that the tax on exports would be found unconstitutional, it would presumably have adopted one of those other systems -- not simply elected "no tax at all." By imposing a scheme of its own making, the court of appeals has left Congress and the country with a statute that is certainly not the "second-best" option that Congress considered.

In like vein, the Government adopts the court of appeals' suggestion that Congress would have wanted the tax to remain in place without exports because the purpose of the HMRA was to raise revenue, and the statute will continue to do so even if exports are excluded. Opp. 10-11. As the Court noted when it rejected a similar argument in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 n.7 (1987), however, this reasoning is "tautological, as Congress' intent to enact a statute on the subject is apparent from the existence" of the statute itself. By the Government's flawed logic, every tax or regulatory statute is by definition severable, because Congress would *always* want half a loaf if it could not have a whole one. Indeed, by the same logic, one could argue that *no* statute is severable, as every severed statute is one that Congress chose not to pass.

The Government, like the court of appeals, ignores the legislative history of the HMRA, which confirms Congress' intention to impose a uniform tax on all domestic and foreign cargo, and dismisses Congress' undeniable reluctance to discriminate among cargo types. Pet. 12-15. In this regard, the Government simply repeats the Federal Circuit's conclusion that Congress' concerns regarding a non-uniform tax were, and continue to be, "speculative." Pet. App. 16a; Opp. 12. It is not

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1/ *See* H. R. REP. No. 99-251, pt. 4, at 24, 26 (1985).

for the courts to say, however, whether Congress' concerns were legitimate or not. The question is whether, on the date of enactment, Congress would have passed a statute that excluded exports. *See* Opp. 6. As the court of appeals agreed, there is evidence that Congress was "so fearful" of the consequences of a statute without exports that it would not have risked such a scheme. Pet. App. 16a. By denying legitimacy to Congress' concerns, the court of appeals impermissibly usurped a legislative function.[2/]

Finally, much is made by the Government of the fact that Congress knew that the tax on exports might raise a significant constitutional question. Opp. 10-11. That point, however, cuts against the decision below. In light of the constitutional question, Congress could have enacted a tax on all cargo except exports, or a distinct tax on exports, imports and other cargo -- each category separate and severable. Instead, Congress imposed a uniform tax on "*any* port use" (*see* Opp. 2), and made clear that it intended the tax to be uniform and nondiscriminatory among cargo types. The fact that Congress crafted the statute to cover "any port use," including exports, even in the face of constitutional concerns, demonstrates that it would not have enacted the statute with that category of cargo excluded.[3/]

[2/] The Government and the court of appeals discount Congress' concerns because the complaints of our trading partners might not have merit. Opp. 12 and Pet. App. 16a. Nonetheless, the issue Congress feared would arise is now on the international trade agenda. Pet. App. 51a-52a. The fact that the issue has been raised alters the dynamics of our country's trading relationships, and could well affect this country's ability to pursue its own interests. The effect of this situation on our foreign relations is not for a court to judge.

[3/] Severance of exports would have had other consequences as well. For example, without revenue from exports, the reduced tax receipts would have limited Congress' ability to finance port projects; financing these

(continued...)

2. The Government's Contention That The Tax On Exports Can Be Severed Cleanly From The HMRA Is Demonstrably False

The Government asserts that the HMRA's provisions regarding exports can "straightforwardly" be severed from the statutory text, and that what remains will still function in the manner Congress intended. Opp. 9. That is not true. Severing exports from the HMRA is a messy business indeed.

As the Government acknowledges the statutory scheme begins with the assessment of the tax on "*any* port use." Opp. 2. The severance process thus requires, as an initial matter, elimination of the word "any."

To implement the severance plan endorsed by the court of appeals, other statutory alterations are also required. The statute defines "port use" to mean "loading or unloading" of cargo. Opp. 2. In order to excise exports, which are "loaded" onto ships, one would have to sever "loading" from the statute. That step, however, would also exempt many coastwise shipments and passenger cruises from the tax, since the tax is assessed on "loading" in those cases as well. The Government's proposed statute, therefore, would impose the entire tax burden only on "unloaded" cargo -- meaning imports, and the remaining passenger cruises and coastwise shipments. *See* Opp. at 9 (under the severed statute, the tax would be paid only "at the time of unloading"). Thus, severance of exports

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[3] (...continued)
projects, all agree, was Congress' principal intention in passing the tax. Pet. App. 2a, 28a; Opp. 2. In fact, Congress has sought to *increase* the tax revenues, not reduce them. *Compare* Pet. App. 41a (original tax rate of .04 percent) *with id.* at 19a (current rate of .125 percent).

from the statute would also distort the tax on other types of cargo.[4/]

The Government contends that, notwithstanding the clear distortion of the statute that would result from severing exports, precedent from this Court supports the court of appeals' approach. Opp. 8 (the Court "has held that statutes could not constitutionally be applied in certain situations, without striking them down in their entirety or suggesting any such result").[5/] The cases on which the Government relies, however, demonstrate that the Court has been reluctant to sever statutes where the result would, as here, significantly alter the statute's scope. In *Alaska Airlines*, for example, the Court severed the legislative veto provision from the statute because, "by its very nature [the provision] is separate from the operation of the substantive provisions of the statute." 480 U.S. at 684-85. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), concerned a statute that regulated "obscene matter." *Id.* at 493. The statute's definition of "obscene matter" included that which "appeals to the prurient interest," or which incites "lust." The Supreme Court held that the term "lust" was overly broad, but was amenable to a limiting construction, accordingly, the statute was invalidated "only insofar as the word 'lust' is to be understood" as reaching protected materials. *Id.* at 504. As noted above, no such "limiting construction" is possible here.

[4/] The severance of exports would also render other provisions of the HMRA meaningless -- for example, the provision which provides that the tax may be assessed only once (*i.e.*, on loading or unloading, but not both). 26 U.S.C. § 4462(g)(l). That this provision even exists confirms Congress' intention to retain both loaded and unloaded cargo, including exports, in the statute.

[5/] The Government's premise -- that the severance issue in this case concerns a statutory application (Opp. 8) -- is wrong. The statute expressly covers exports, so the question is whether that language can be excised from the statute's text without damaging the statutory scheme.

In *United States v. Grace*, 461 U.S. 171 (1983), the Court held that a statute prohibiting leafleting around the Supreme Court could not apply to the sidewalk, but declined to consider the effect of the decision on the remainder of the statute (that is whether the statute could be enforced on the Court grounds). *Id.* at 175 ("[W]e shall address only whether the proscriptions of § 13k are constitutional as applied to the public sidewalks"). Severability was not an issue in the case.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which the Government also cites, the Court upheld a state court decision holding that a mandatory schooling statute could not be applied to the Amish sect. Again, the Court did not directly address severability. As in its later decision in *Alaska Airlines*, however, the Court made clear that, the Amish being a small minority, excepting them would not "undermine" the statutory program, as it would not affect the "general applicability of the State's compulsory school-attendance statutes[.]" *Id.* at 236. *Yoder* thus stands in stark contrast to *Sloan v. Lemon*, 413 U.S. 825 (1973), in which the Court refused to sever a statute as between aid to religious and secular schools; "to approve such a distinction here," the Court reasoned, "would be to create a program quite different from the one the legislature actually adopted." *Id.* at 834. The present case resembles *Sloan*, not *Yoder*. Severing exports from the HMRA, like the proposed removal of religious schools from the statute in *Sloan*, would dramatically change the statute in a way that the legislature certainly never enacted.

The thrust of severability jurisprudence over the decades has been, and remains, that the courts may not redraft federal statutes by their own lights. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936) (courts may not "give the statute an effect altogether different from that sought by the measure viewed as a whole" [internal quotation marks omitted]); *Alaska Airlines*, 480 U.S. at 685 (the statute, after

severance, must still "function in a *manner* consistent with the intent of Congress" [emphasis in original]); *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (severance was inappropriate in view of the statute's "open-ended character"). The decisions in which the court has severed a statute have typically involved the excision of the single word or discreet provision that rendered the statute unconstitutional. *See, e.g., Reno*, 521 U.S. at 883 ("[W]e will sever [only] the [unconstitutional] term 'or indecent' from the statute, leaving the rest of §223(a) standing"); *Alaska Airlines, supra.* The court of appeals' decision, by contrast, carves away much of the statute, and leaves a hodge-podge tax scheme that Congress could never have contemplated. No principle or authority in the Government's brief justifies that result.

3. The Substantial Weight Given To The WRDA's Severability Clause Is Misplaced

Perhaps the most telling aspect of the Government's argument is its virtual silence on the issue of whether the court of appeals' approach to severability was proper at all. The court relied on the severability clause in the WRDA, and the "presumption" of severability purportedly established in *Alaska Airlines*. Pet. App. 11a. As Petitioners have pointed out, this "presumption" does not have a solid foundation in the case law, and directly conflicts with the dominant line of Supreme Court decisions in which the Court declined to sever a statute out of concern that doing so would intrude on legislative prerogatives. Pet. 18-24. The court of appeals itself acknowledged these "different formulations" of the severability standard in Supreme Court precedent. Pet. App. 11a.

The Government, in a footnote, purports to reconcile the different approaches to severability exemplified by *Alaska Airlines* and *Reno*. Opp. 9-10, n.6. The Government does not even attempt to distinguish the other cases cited in the Petition

(such as *Sloan* and *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976)), and it ignores entirely the critical language in *Reno* in which the Court cautions against severing statutes. Indeed, given the proposition that Congress was aware that the HMRA was subject to an Export Clause challenge (Opp. 10), the admonition in *Reno* that "judicial rewriting of statutes would derogate [from] Congress' incentive to draft a narrowly tailored law in the first place" has a great deal of force. 521 U.S. at 885 n.50 (internal quotation omitted). As the Court held, "It would certainly be dangerous" to allow Congress to draft broad statutes of questionable validity, and leave to the courts the task of redrafting the statutes to conform to constitutional norms. *Id.* at 884, n.49, quoting *United States v. Reese*, 92 U.S. 214, 221 (1876). Yet that is exactly what the court of appeals did here.

Moreover, contrary to the Government's view, the WRDA's severability clause has no application to this case. According to the Government, "The clause appears in Title XIV of the WRDA, entitled 'General Provisions,' and its use of the term 'this Act' naturally refers to the entire WRDA -- of which Title XIV, enacting the HMT, is a part." Opp. 7, n.5. That is true, but the Government (like the court of appeals) misconstrues the effect of the WRDA's severability clause. The clause provides that "If any provision of this Act [*i.e.*, the WRDA]" is found unconstitutional, the remainder of the WRDA "shall not be affected thereby." Pet. App. 50a. The "provision" to which the WRDA severability clause applies is section 1402 of the WRDA, the *entire* tax, and not the separate provisions concerning cargo types. In other words, if the tax is unconstitutional, the WRDA is preserved; but the WRDA's severability clause does not permit severance of one tax provision from another.

The interplay between the WRDA and the HMRA makes this point clear. For example, whereas the Government

contends that the HMRA and the WRDA are the same "Act," the HMRA refers to the WRDA as a separate statute. Pet. App. 46a (referring, within the HMRA, to "section 1407(a) of the Water Resources Development Act of 1986"). Moreover, the text regarding the tax as enacted in the WRDA (*see* Pet. App. 41a-49a) is set forth in quotation marks, indicating that Congress intended the statute to be treated as a consolidated, inseverable unit. Nothing in the WRDA's severability clause indicates that Congress intended it to be used as a tool to pierce into the tax, and dismember its constituent parts. Finally, the WRDA's severability clause is included with the rest of that statute in 33 U.S.C., while the tax provisions are codified in 26 U.S.C., the Internal Revenue Code ("IRC"). The appropriate place to look for a severability clause relevant to the tax provisions, therefore, is in the IRC. Yet Congress provided that the IRC severability clause does not apply to this tax.[6] Accordingly, viewed in the context of the tax's structure, location, and terms, the WRDA's severability clause does not permit the severance of exports from the HMRA.

4. The CIT's Decision Was Correct

The Government accuses Petitioners of failing to defend the reasoning on which the Court of International Trade based its decision striking the HMRA in its entirety. Before the Federal Circuit, however, Petitioners noted that the CIT's decision rested on the correct observation that the HMRA "has equated passengers with cargo," and the tax on the "loading" of cargo had been held unconstitutional. The CIT's observations on the structure and language of the statute support the view that it is inseverable as between cargo types. What Petitioners did not defend was the Government's erroneous view that the

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[6] The IRC's severability clause, 26 U.S.C. § 7852(a), is in IRC subtitle F. Pursuant to 26 U.S.C. § 4462(f)(3), subtitle F does not apply to the HMRA.

CIT had held the tax unconstitutional as to passengers under the Export Clause. In any event, the CIT's treatment of the statute was correct, and its judgment should be reinstated.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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